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No. (1)

In The
Supreme Court of the United States

WFMJ TELEVISION, INC.,
Petitioner,

v.

CATHERINE BOSLEY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID L. MARBURGER
Counsel of Record
MATTHEW J. CAVANAGH
BAKER & HOSTETLER LLP
3200 NATIONAL CITY CENTER
1900 EAST NINTH STREET
CLEVELAND, OHIO 44114
(216) 621-0200

Counsel for Petitioner

November 26, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1st question presented.

In Kokkonen v. Guardian Life Ins. Co.,[1] this Court ruled that a federal district court has no power to enforce a private settlement agreement after unconditionally dismissing a civil suit with prejudice.

Here, upon notice by defendant WFMJ (petitioner here) of an effective out-of-court oral settlement, the district court *sua sponte* dismissed the suit with prejudice and *sua sponte* retained continuing jurisdiction to resolve future disputes over settlement. The court did not order the parties to settle, or to abide by any terms, nor did the court adopt any settlement terms in its order.

Later, the plaintiffs moved the court to enforce settlement, and then unconditionally withdrew the motion. They separately moved to vacate the dismissal, and to set the case for trial. WFMJ didn't oppose.

The court then ordered the parties to appear for an evidentiary hearing on settlement, which it conducted. Three months later, the court ordered WFMJ to comply with the plaintiffs' version of the purported oral settlement.

The Sixth Circuit affirmed.

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[1] 511 U.S. 375 (1994).

Although the Sixth Circuit concluded that "there can be no doubt that the document filed with the district court expresses a unilateral desire on the part of the plaintiffs to withdraw their motion," the court ruled that the district court had continuing jurisdiction after that to order the settlement.

Where a dismissal with prejudice does not order the parties to settle or to abide by any settlement terms, but contains a bare and unsolicited recital of continuing jurisdiction over settlement disputes, does a district court have the power to enforce settlement? Even after the parties withdraw all requests for that enforcement?

2d question presented.

In dicta, Kokkonen suggested that a district court could retain continuing jurisdiction to enforce settlement of a dismissed suit if the parties agreed to it. Here, the defendant WFMJ (petitioner here) advised the district court of an "effective" out-of-court oral settlement. No party sought a dismissal. The next day, the district court *sua sponte* dismissed the suit with prejudice and *sua sponte* recited that it retained continuing jurisdiction over future settlement disputes.

The parties had not agreed among themselves that the district court would be the final arbiter of settlement disputes, and did not ask the district court to retain that authority. About six months later, the district court ordered WFMJ to comply with the plaintiffs' version of purported settlement terms.

Does Kokkonen authorize district courts to retain jurisdiction over settlement by *sua sponte* dismissing the case with prejudice and *sua sponte* retaining jurisdiction over settlement?

PARTIES TO THE PROCEEDING

Petitioner WFMJ Television, Inc. was a defendant in the district court and an appellant in the court of appeals. John Urchak and Michelle Nicks were both defendant-appellants below, and are therefore respondents here under Rule 12.6.

Respondents Catherine Bosley and Richard Brown were plaintiff-appellees below.

CORPORATE DISCLOSURE STATEMENT

Petitioner WFMJ Television, Inc. is a closely held company. It has no publicly held parent companies or subsidiaries. No publicly held company owns any WFMJ Television, Inc. stock.

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Petitioner WFMJ Television, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion (App. 1a-22a) is unreported. The district court's order enforcing settlement (App. 23a-44a) is unreported.

JURISDICTION

The court of appeals entered its judgment on July 13, 2007. On October 12, 2007, Justice Stevens granted WFMJ's application for an extension of time to file its petition for certiorari by November 26, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. art. III, § 2, cl.1 provides, in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, [and] . . . to Controversies . . . between Citizens of different States . . .

PRELIMINARY STATEMENT

I. Backdrop: the rapidly changing role of federal district judges from focusing on adjudicating to focusing on settlement.

Since the advent of the Federal Rules of Civil Procedure, the federal judiciary has experienced a sea change in the role of district court judges, shifting from adjudicators of civil cases to getting them settled.

The Rules went from saying nothing about district court judges fomenting settlement to authorizing district judges in 1993 to require the parties and their lawyers to attend settlement conferences conducted by the court.[2]

While the number of cases, the number of federal judges, and the number of federal magistrate judges have grown, the number of federal civil trials has dropped steeply.[3] When the Rules took effect in 1938, federal judges tried over 19% of their civil cases. In 2003, they tried 1.7%.[4]

The sharpest drop has been since 1985. The number of federal civil trials dropped by two-thirds

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[2] J. Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. 593, 610-613 (2005).

[3] M. Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stan. L. Rev. 1255, 1256-1258 (2005).

[4] Galanter, 57 Stan. L. Rev. at 1258-1259.

from a high of 12,750 in 1985 to 4,206 in 2003.[5] During that period, the number of settled cases has gone up substantially.[6]

Observers say that the shift in emphasis from adjudicating to negotiating settlement has caused the "vanishing trial."[7] "Good judges" have become those who promote settlement instead of adjudication, Yale Law Professor Judith Resnik opines.[8]

The shift to "a settlement culture," as one federal judge calls it, where settlement is "the central goal of our federal court processes" has stirred controversy within the federal judiciary and a mass of scholarly debate.[9]

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[5] Galanter, 57 Stan. L. Rev. at 1260.

[6] Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. at 638 & n.180; Galanter, 57 Stan. L. Rev. at 1265-1266; M. Galanter & M. Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339, 1340 (1994).

[7] Galanter, 57 Stan. L. Rev. at 1264-1266; Resnik, 80 Notre Dame L. Rev. at 638; Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. Miami L. Rev. 173, 188-91 & n.84 (2004).

[8] Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. at 618.

[9] *Delaventura v. Columbia Acorn Trust*, 417 F.Supp.2d 147, 150 n.4 (D. Mass. 2006) and articles cited in n.4; *e.g.*, *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (en banc), 657-663 (Posner, J., dissenting), 662 (Coffey, J., dissenting), 663-664 (Easterbrook, J., dissenting), 666-671 (Manion, J., dissenting); *In re NLO, Inc.*, 5 F.3d 154, 157-158 (6th Cir. 1993);

Much of that debate has centered on whether the judiciary's legitimate interest in effecting settlements should relax some of the strictures on courts as an institution. This Court entered that debate in 1994 with three unanimous decisions: U.S. Bancorp Mtge Co. v. Bonner Mall Partnership,[10] Digital Equip. Corp. v. Desktop Direct, Inc.,[11] and Kokkonen v. Guardian Life Ins. Co.[12]

In U.S. Bancorp, the Court held that the parties' agreement to settle while on appeal did not justify vacating the contested district court judgment. Recognizing that "[j]udicial precedents are ... valuable to the legal community as a whole," the Court said that the "mere fact that the settlement agreement provides for vacatur" doesn't require the district court to vacate its judgment.[13]

In Digital Equip., the parties negotiated a settlement, causing the plaintiff to dismiss its suit

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J. Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982); O. Fiss, *Against Settlement*, 93 Yale L. J. 1073 (1984); M. Cordray, *Settlement Agreements and the Supreme Court*, 48 Hastings L. J. 9 (1997); Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. 593 (2005); J. Parness, *American General Jurisdiction Trial Courts: New Visions, New Guidelines*, 55 Univ. Kan. L. Rev. 189 (2006).

[10] 513 U.S. 18 (1994).

[11] 511 U.S. 863 (1994).

[12] 511 U.S. 375 (1994).

[13] 513 U.S. at 26, 29.

voluntarily. Later, the plaintiff moved to vacate the dismissal and rescind the settlement contract, which the district court granted.

The defendant appealed immediately, arguing that its interest in the benefit of its bargain – avoiding trial – allowed it to appeal under the collateral order doctrine, thus relaxing the "final decision rule" for appellate jurisdiction.[14] This Court disagreed, ruling that "a refusal to enforce a settlement agreement claimed to shelter a party from suit altogether does not supply the basis for immediate appeal under [28 U.S.C.] §1291."[15]

In Kokkonen, this Court decided that a federal district court does not have jurisdiction to grant a motion to enforce settlement filed by one of the parties after they had stipulated to dismiss the suit with prejudice unconditionally.

The Court reversed the court of appeals' decision, which rested on the conclusion that the policy favoring settlement justified the district court's assumption of jurisdiction.[16] The Court concluded that state court, not federal court, was the proper forum for the parties' contract dispute, a matter of state law.[17]

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[14] 511 U.S. at 867.

[15] 511 U.S. at 884.

[16] *Kokkonen*, No. 92-16628, 1993 WL 164884 at *1 (9th Cir. 1993).

[17] 511 U.S. at 382.

The Court's opinion included advisory dicta that has sparked this petition and yielded considerable disarray among the decisions of the federal courts.

II. The dicta of Kokkonen.

Kokkonen focused most on the kind of ancillary jurisdiction that gives federal courts jurisdiction to effectuate their own judgments and to vindicate their authority. The Court decided that ancillary jurisdiction didn't attach to enforcing settlement merely because dismissing the federal suit was part of the consideration for the parties' settlement contract.[18] The Court ruled that enforcing settlement wasn't necessary to effectuate the district court's order of dismissal.[19]

But in dicta, the opinion advised that, "[i]f the parties *wish* to provide for the court's enforcement of a dismissal-producing settlement," they could do that in either of two ways.[20]

One would be to ask the court to embody the terms of the settlement in the dismissal order.[21] The other, mentioned parenthetically, would be for the parties to stipulate in the order that the court was "retaining

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[18] 511 U.S. at 380.

[19] 511 U.S. at 380-381.

[20] 511 U.S. at 381 (emphasis in original).

[21] 511 U.S. at 381.

jurisdiction" over the settlement agreement.[22] Equating those two scenarios, the Court opined that either would give the district court ancillary jurisdiction to enforce the settlement contract because "a breach of the agreement would be a violation of the order."[23]

Those observations are at the heart of this petition.

III. Disarray among the lower federal courts in applying Kokkonen's dicta, and the crux of this case.

A. Lower court confusion in applying Kokkonen's dicta.

Although Kokkonen cautioned that it is "the holdings of our cases, rather than their dicta" that define ancillary jurisdiction, the opinion's dicta has spawned an explosion of litigation about the existence and extent of district courts' assuming continuing ancillary jurisdiction over settlement of a dismissed case.[24]

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[22] 511 U.S. at 381, 382.

[23] 511 U.S. at 381.

[24] 511 U.S. at 379; *see* 8 James Wm. Moore, Moore's Federal Practice, § 41.34[6][h] (3d ed. 2007) (collecting cases); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2366, at 140-142 (2d ed. Supp. 2007) (collecting cases); M. Denlow, *Federal Jurisdiction in the Enforcement of Settlement Agreements:* Kokkonen *Revisited*, 2003 Fed. Cts. L. Rev. 2, 7-16 (2003) (discussing applications of *Kokkonen* by various circuit courts); *see also* 50 West's Federal

Professor Resnik posited that the "speculative language" and "tentative and suggestive phrases" in Kokkonen's dicta may mean that the Court "was unprepared to decide definitively how and when ancillary federal jurisdiction was to be available for post-settlement conflict resolution."[25]

Citing a host of inconsistent decisions by the federal courts of appeals, Resnik observed: "Whatever prompted the Court's lack of specificity, as a technical matter, exactly how to establish federal jurisdiction after *Kokkonen* remains unclear."[26] As a result, "many lower court judges disagree about what *Kokkonen* requires."[27]

Professor Jeffrey Parness concurs: "Since *Kokkonen*, the lower federal courts have struggled with requests for the exercise of ancillary settlement enforcement jurisdiction."[28] Kokkonen's dicta has

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Practice Digest 4th *Federal Courts* Key No. 25 (2002 & Supp. 2007); 19A West's Federal Practice Digest 4th *Compromise & Settlement* Key No. 21 (2005 & Supp. 2007).

[25] Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. at 635.

[26] Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. at 635.

[27] Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. at 635.

[28] J. Parness & M. Walker, *Enforcing Settlements in Federal Civil Actions*, 36 Indiana L. Rev. 33 (2003).

resulted in "continuing uncertainties and confusion."[29]

Other commentators echo those analyses, observing that Kokkonen's dicta has "created confusion among lower courts," including "inter- and intra- circuit confusion."[30]

Parness identified the major uncertainties:

> Troubling issues include when and how ancillary enforcement jurisdiction should be retained, when such jurisdiction should later be exercised, and what substantive laws and procedures should be employed in settlement enforcement proceedings.
>
> Neither the Supreme Court in its common law decisions or court rules, nor Congress in statutes, has provided significant guidance.[31]

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[29] J. Parness & M. Walker, *Enforcing Settlements in Federal Civil Actions*, 36 Indiana L. Rev. at 34.

[30] E. Deason, *Procedural Rules for Complementary Systems of Litigation & Mediation*, 80 Notre Dame L. Rev. 553, 581 n.141 (2005); C. Green, *Justice Scalia and Ancillary Jurisdiction: Teaching a Lame Duck New Tricks*, 81 Va. L. Rev. 1631, 1635 n.16 (1995); *accord* M. Denlow, *Federal Jurisdiction in the Enforcement of Settlement Agreements:* Kokkonen *Revisited*, 2003 Fed. Cts. L. Rev. 2, 7, 16-17 (2003).

[31] Parness & Walker, *Enforcing Settlements in Federal Civil Actions*, 36 Indiana L. Rev. 33.

He predicted that "[t]roubles will likely continue as civil case settlements are being promoted more than ever."[32]

Parness noted that uncertainties about ancillary jurisdiction over settlement "triggered at times standardless discretionary judicial acts."[33] What happened in this case is one of them.

B. The crux of this action.

In this copyright infringement case, defendant WFMJ Television, Inc. (petitioner here) unilaterally advised the district court that out-of-court settlement talks had yielded an "effective" oral settlement that hadn't been "consummated" yet or put in writing, and suggested that the court not convene a jury for the upcoming trial.[34]

The next day, the court issued an order *sua sponte* dismissing plaintiffs' suit with prejudice and *sua sponte* reserved "continuing jurisdiction" under Kokkonen to resolve disputes in memorializing settlement.[35] The plaintiffs (respondents here) are

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[32] Parness & Walker, *Enforcing Settlements in Federal Civil Actions*, 36 Indiana L. Rev. 33.

[33] J. Parness & D. Sennott, *Expanded Recognition in Written Laws of Ancillary Federal Court Powers*, 64 U. Pitt. L. Rev. 303, 320 (2003).

[34] (App. 45a.)

[35] (App. 48a–49a.)

Catherine Bosley and her husband Richard Brown who claim to own the copyright at issue.

Two weeks later, the parties advised the court that they couldn't conclude a final settlement. Bosley moved to enforce the substance of the pre-dismissal negotiations as comprising the entire contract. WFMJ opposed, saying that those talks hadn't flushed out the substance of the skeletal terms discussed.

About a month later, Bosley's settlement motion remained pending. She filed a notice with the court unconditionally withdrawing the motion.[36] Later that day, she moved the court to vacate the *sua sponte* dismissal order and to set the case for trial.[37] WFMJ didn't oppose. Several days later, the court ordered the parties to appear for an evidentiary hearing on the motion to enforce settlement, which a magistrate judge conducted.

About three months after that, on April 7, 2006, the court granted the plaintiffs' motion to enforce settlement.[38] It did that after effectively converting their unconditional notice of withdrawal into a "motion" to withdraw, which it then denied. It also denied the plaintiffs' unopposed motion to vacate the dismissal order and set the case for trial.

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[36] (App. 54a-55a.)

[37] (App. 60a–63a.)

[38] (App. 23a–44a.)

WFMJ appealed to the United States Court of Appeals for the Sixth Circuit, arguing that the district court didn't have jurisdiction to grant the plaintiffs' settlement motion. The Sixth Circuit panel affirmed the district court, although concluding that "there can be no doubt that the document filed with the district court expresses a unilateral desire on the part of the plaintiffs to withdraw their motion."[39] The court of appeals decided that the parties' litigation at the evidentiary hearing and afterward kept the court's self-invoked jurisdiction over settlement alive.

IV. The Seventh Circuit's contrary view.

The United States Court of Appeals for the Seventh Circuit, principally in opinions by Judge Posner, won't give effect to provisions that retain jurisdiction to resolve future disputes over a privately-negotiated settlement contract when coupled with dismissals with prejudice. Thus:

> An even more serious problem is the conjunction of dismissal with prejudice with retention of jurisdiction to enforce the settlement agreement. ....
>
> [A] district judge cannot dismiss a suit with prejudice, thus terminating federal jurisdiction, yet at the same time retain jurisdiction to enforce the parties' settlement that led to the dismissal with prejudice.

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[39] (App. 6a.)

The Seventh Circuit repeated that view about two weeks after the Sixth Circuit decided this case. The Seventh Circuit said:

> [W]hen a suit is dismissed with prejudice, it is gone, and the district court cannot adjudicate disputes arising out of the settlement that led to the dismissal merely by stating that it is retaining jurisdiction.

Dupuy v. McEwen, 495 F.3d 807, 809 (7th Cir. 2007) (Posner, Easterbrook, Evans, JJ.).[40]

In Dupuy, the Seventh Circuit recognized that other circuits disagree with its view, citing decisions collected in a law review article written by a federal magistrate judge.[41] Unlike the Seventh Circuit, the cases in the other circuits "assume that combining dismissal with prejudice with retention of jurisdiction to enforce the settlement is a permissible method of retaining authority to decide disputes arising from the settlement," as did the Sixth Circuit here.[42]

Federalism underlies much of the Seventh Circuit's disagreement with other circuits and with this Court's

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[40] *Accord Lynch, Inc. v. SamataMason, Inc.*, 279 F.3d 487, 489 (7th Cir. 2002) (Posner, Easterbrook, Bauer, JJ.); *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002) (Posner, Easterbrook, Kanne).

[41] 495 F.3d at 809, citing M. Denlow, *Federal Jurisdiction in the Enforcement of Settlement Agreements: Kokkonen Revisited*, 2003 Fed. Cts. L. Rev. 2 (2003).

[42] *Dupuy*, 495 F.3d at 809.

suggestions in Kokkonen. The Seventh Circuit explained:

> The purpose of ancillary jurisdiction of the federal courts ... is to enable a federal court to render a judgment that resolves the entire case before it and to effectuate its judgment once it has been rendered. ...
>
> It is not to enable a federal court to encroach on the jurisdiction reserved to the states merely because the parties would prefer to have a federal court resolve their future disputes ....

Shapo, 463 F.3d at 645.

Indeed, the Seventh Circuit pointed out, the parties could not stipulate validly in a dismissal order that the court would retain jurisdiction if one of them sued their lawyer for malpractice in negotiating the settlement that caused the dismissal. "Parties cannot confer federal jurisdiction by agreement."[43]

The Seventh Circuit distinguishes those bare "retaining jurisdiction" orders from consent decrees that embody the settlement terms, insisting that the two do not have "the same effect" as stated in Kokkonen's dicta.[44]

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[43] *Shapo*, 463 F.3d at 645.

[44] *Kokkonen*, 511 U.S. at 382, see 381.

Because consent decrees are essentially settlement agreements with mandatory judicial commands, the Seventh Circuit recognizes that district courts would have continuing jurisdiction to enforce their terms as they would with any injunction.[45] But dismissing with prejudice and merely retaining jurisdiction over future settlement disputes does not give the court continuing jurisdiction over those future disputes.

V. The crux of what this Court should rule to guide the lower federal courts.

This Court should grant this petition to resolve the continuing confusion among the lower federal courts arising from Kokkonen's dicta. The Court should do that by abandoning the Kokkonen suggestion that would equate the jurisdictional effect of outright dismissals that contain bare recitals of continuing jurisdiction over settlement with the jurisdictional effect of consent decrees that direct the parties to comply.

This Court should rule that merely retaining jurisdiction to resolve disputes over an unseen settlement agreement does not have the same jurisdictional effect as a consent decree embodying the settlement's terms. That distinction, recognized by the Seventh Circuit but ignored by the Sixth and other circuits in relying on Kokkonen's dicta, is pivotal in this case.

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[45] *E.g.*, *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002); *Shapo*, 463 F.3d at 643.

Where a court has concluded the merits of a case by adopting the terms of a settlement and mandating that the parties comply with it, the court has placed its power and prestige behind the contracted settlement terms. If one of the parties breaches those terms, that party has violated the order, as Kokkonen's dicta says, and the court has continuing jurisdiction to enforce that order.[46]

Because the court has ordered the parties to comply with the terms of its consent decree, it must "exercise independent judgment regarding compliance."[47] It "may not blindly defer to the stipulation of the parties" when they ask the court to terminate the decree.[48]

Therefore, when parties to a consent decree advise the court that they no longer seek its enforcement, the matter is not moot. The court has the duty to decide independently whether to continue its jurisdiction to effectuate its own directives.

But merely retaining post-dismissal jurisdiction to resolve disputes over an unseen settlement agreement is different organically. There, the court hasn't directed the parties to do anything. It hasn't ordered them to settle and it hasn't ordered them to comply with any settlement terms. If the parties fail to

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[46] *Kokkonen*, 511 U.S. at 381.

[47] *United States v. State of Michigan*, 18 F.3d 348, 351 (6th Cir. 1994).

[48] *State of Michigan*, 18 F.3d at 352.

consummate a final deal, or later breach a final deal, they haven't violated the court order.

At most, the effect of the court retaining jurisdiction is to enable the parties to move the court to enforce their private settlement contract at their option and without having to file a new lawsuit, a view endorsed by the Seventh Circuit.[49]

As distinct from a consent decree, when a party invokes the bare retention of jurisdiction after a dismissal with prejudice, Article III's mootness doctrine applies when the parties advise the court (separately or together) that they no longer seek enforcement of settlement. At that point, the district court loses whatever jurisdiction it had. It cannot then proceed to order either party to comply with a perceived settlement or to continue to litigate over it.

Moreover, under Kokkonen's holding, rather than its dicta, the parties can't invoke the purportedly retained jurisdiction validly unless their contract dispute presents a federal question or satisfies the requirements for diversity jurisdiction under the federal statutes providing for that jurisdiction.

Adopting that analysis would require this Court to reverse the Sixth Circuit's judgment here, require the district court to vacate it order granting Bosley's motion to enforce settlement, and to establish that the

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[49] *Jessup*, 277 F.3d at 929.

state courts supply the exclusive forum for these nondiverse parties to resolve their settlement dispute.

STATEMENT OF THE CASE

I. The parties and the underlying suit.

Petitioner WFMJ Television, Inc. is a defendant, and owns television station WFMJ in Youngstown, Ohio. Respondents are the two plaintiffs, Catherine Bosley and her husband Richard Brown, who live and work in northeast Ohio.

Bosley sued WFMJ and two of its employees in the federal district court in Cleveland, Ohio, claiming ownership of a copyright in a videotape, and alleging that the employees infringed the copyright by copying the tape.

II. WFMJ's notice of effective settlement.

Jury trial was to begin on November 28, 2005, the Monday after Thanksgiving. On the night before Thanksgiving, while driving home through a blizzard that night, one of WFMJ's lawyers – Stephen Bolton -- had cell phone conversations with one of Bosley's lawyers, Andrew Kabat. They agreed that WFMJ would pay a specified sum of money to settle the case. They later disputed whether they had defined the substance of what WFMJ would receive in exchange for the payment.

Upon learning about the cell phone conversations, another of WFMJ's counsel, David Marburger, understood that the parties had cleared the most

contentious settlement hurdle. Expecting no difficulty in concluding a final, written agreement, realizing that the judge would be preparing for trial during the holiday weekend, and that the court had summoned prospective jurors, Marburger filed a notice of settlement with the court. He filed it electronically on the day after Thanksgiving. In its entirety, the notice said:

> Defendants WFMJ Television, Inc., Michelle Nicks, and John Urchak hereby notify the Court that they have effectively reached a settlement with the plaintiffs.
>
> The documents consummating the settlement are being drafted now. They have not yet been circulated, or (obviously) signed.
>
> Accordingly, there is no need to impanel a jury for trial on Monday, November 28, 2005.

(App. 45a–47a.) The document was titled "Notice of Settlement" and the document identifier at the bottom of the page said "Notice of Tentative Settlement."[50]

Marburger did not advise the court of any settlement term that the lawyers discussed or agreed upon.

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[50] (App. 45a–47a.)

III. *Sua sponte* dismissal with prejudice, reserving continuing jurisdiction over settlement disputes under *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994).

The next day – the Saturday after Thanksgiving, November 26, 2005 – the court dismissed the suit with prejudice *sua sponte*, adding a *sua sponte* retention of continuing jurisdiction over disputes in memorializing settlement. In its entirety, the court's dismissal order said:

> Upon representation of counsel that the above-captioned case has been settled between the parties, IT IS ORDERED that the docket be marked, settled and dismissed with prejudice.
>
> Any subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order.
>
> FURTHER, the Court retains continuing jurisdiction to resolve disputes concerning the memorialization of this settlement agreement. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994).

(App. 48a-49a.)

IV. Bosley moves to enforce settlement.

About two weeks later, on December 15, 2005, Bosley moved "to enforce settlement agreement

reached on November 23, 2005."[51] She sought an "order enforcing the settlement" based on counsels' Thanksgiving eve phone calls.

WFMJ opposed the motion the next day, saying that not enough was said on the phone to comprise the full and literal terms of a final agreement.[52] WFMJ said that it was willing to keep negotiating.

V. Bosley unconditionally withdraws her motion to enforce settlement and moves to vacate the dismissal for trial on the merits.

Thirty days after the court had dismissed Bosley's suit with prejudice, WFMJ appealed to the United States Court of Appeals for the Sixth Circuit (No. 06-3091). Ultimately, WFMJ told the Sixth Circuit that there was no final settlement, but that the dismissal with prejudice was the correct judgment because the district court should have granted WFMJ's motion for summary judgment on the merits. Bosley neither appealed nor cross-appealed.

On January 9, 2006, about two weeks after WFMJ appealed and three weeks after Bosley moved to enforce settlement, the district court referred Bosley's motion to a magistrate judge for report and recommendation. After the magistrate judge and the parties had difficulty scheduling an evidentiary

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[51] (Motion, #333.)

[52] (Memor., # 334.)

hearing, Bosley filed a notice unconditionally withdrawing her motion to enforce settlement.[53]

She filed the notice on January 19, 2006. In its entirety, the notice said:

> Plaintiffs, by and through counsel, hereby withdraw their Motion to Enforce Settlement Agreement Reached on November 23, 2005, which was filed on December 15, 2005.

(App. 54a–55a.) Bosley titled the notice: "Plaintiffs' notice of withdrawal of motion to enforce settlement agreement reached on November 23, 2005."[54]

Later on the same day, Bosley moved to vacate the *sua sponte* dismissal with prejudice that had reserved continuing jurisdiction to resolve disputes in memorializing settlement.[55] Saying that she was frustrated with the delay in resolving her settlement motion, Bosley also moved the court to set the case for trial on the merits.

No defendant opposed.

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[53] (App. 54a–56a.)

[54] (App. 54a.)

[55] (App. 60a–63a.)

VI. The district court grants Bosley's (withdrawn) motion to enforce settlement over three months later.

WFMJ contends that when Bosley unconditionally withdrew her settlement motion on January 19, and moved unopposed to vacate the dismissal order and go to trial, the district court lost whatever jurisdiction it had to grant Bosley's motion to enforce settlement.

But after Bosley withdrew her settlement motion, the court ordered the parties to appear for an evidentiary hearing on whether the parties had settled, which resulted in more litigation.

About three months later – on April 7, 2006 – the district court granted Bosley's motion to enforce settlement. The district court did that by, in effect, converting Bosley's unconditional notice withdrawing her settlement motion into a "motion" to withdraw the settlement motion. The court then treated Bosley as moving separately, but simultaneously, for an order to grant her settlement motion and for an order allowing her to withdraw the settlement motion. The court denied her "motion" to withdraw the settlement motion and granted the settlement motion.[56]

The district court also denied Bosley's unopposed motion to vacate the dismissal order that had retained jurisdiction over settlement.[57]

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[56] (App. 23a–44a.)

[57] (App. 23a–44a.)

VII. The court of appeals affirms.

WFMJ appealed the district court's granting of Bosley's motion to enforce settlement, principally arguing that her unconditional withdrawal of the motion rendered the matter moot, depriving the court of Article III jurisdiction to grant it and ended whatever jurisdiction Kokkonen could have authorized the court to reserve. WFMJ added that Kokkonen's dicta did not and could not allow the district court's self-authorized continuing jurisdiction to enforce settlement after Bosley had abandoned her motion, sought a trial on the merits, and WFMJ had advised the court that it saw no final settlement to enforce.

Bosley's merits brief to the Sixth Circuit acknowledged that her motion to enforce settlement "had been withdrawn."[58] The court of appeals concluded that "there can be no doubt that the document filed with the district court expresses a unilateral desire on the part of the plaintiffs to withdraw their motion."[59]

But the court of appeals nevertheless concluded that the settlement matter was "not moot" principally because the parties continued "vigorous" litigation over the settlement issue afterward.[60] Finding that the evidence adduced in the evidentiary hearing conducted

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[58] (Appellee brief in 6th Cir. at 34.)

[59] (App. 6a.)

[60] (App. 6a.)

after Bosley had withdrawn her settlement motion was enough to form a contract, the Sixth Circuit affirmed.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition to resolve the continuing confusion among the lower federal courts arising from Kokkonen's dicta, as explained in the preliminary statement, and because the court of appeals erred as a matter of law in finding federal jurisdiction to enforce settlement when there wasn't any.

I. The Sixth Circuit's opinion is inconsistent with Article III's mootness doctrine.

When the district court dismissed this copyright case with prejudice *sua sponte*, and *sua sponte* retained continuing jurisdiction to resolve disputes concerning the memorialization" of settlement,[61] the court knew nothing of any actual or potential settlement term, and did not order the parties to settle or abide by any agreement.

The court of appeals recognized that, nearly two months later, on January 19, 2006, Bosley filed a notice withdrawing her post-dismissal motion to enforce settlement.[62] The court of appeals concluded that "there can be no doubt that the document filed

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[61] (App. 48a–49a.)

[62] (App. 54a–55a.)

with the district court expresses a unilateral desire on the part of the plaintiffs to withdraw their motion."[63]

Despite that conclusion, the Sixth Circuit decided that the Article III controversy was "not moot" principally because the parties continued "vigorous" litigation over the settlement issue afterward.[64]

That conclusion would be correct if the district court had continuing jurisdiction under a consent decree. But after Bosley withdrew her settlement motion, the district court could not rest its continuing jurisdiction on any need to vindicate or effectuate the dismissal of the merits, a ground unanimously rejected in Kokkonen's holding.[65] And there was no order that the district court needed to enforce. The district court did not direct the parties to settle or to abide by any agreement. If both parties had walked away from settlement, simply deciding to quit, they would have violated no court order.

Just three days before the Sixth Circuit opinion here, a different panel adopted an analysis much like WFMJ's. The panel wrote that "where, as here, the district court affirmatively opts to maintain jurisdiction even after the filing of the notice of appeal for the purpose of resolving still-pending motions, its

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[63] (App. 6a.)

[64] (App. 6a.)

[65] 511 U.S. at 380-381.

jurisdiction expires following the resolution of the last motion."[66]

The Federal Circuit ruled similarly in a similar circumstance in Earth Island Institute v. Albright.[67] There, the district court gave the defendant United States a deadline to issue revised regulations in response to Earth Island's challenge of existing ones. After the deadline, Earth Island filed a motion "to enforce the court's judgment," alleging that the government had failed to comply with the court's order.

After oral argument on the motion to enforce, Earth Island filed a letter with the court, saying "plaintiffs hereby withdraw their motion to enforce the judgment."[68]

The district court, however, elected to treat Earth Island's letter as a "petition to withdraw" its motion to enforce. It then denied that petition, and granted the motion to enforce.[69] The Federal Circuit reversed, ruling that the district court had no Article III jurisdiction to grant Earth Island's motion to enforce. The Federal Circuit concluded:

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[66] *Dixon v. Clem*, 2007 WL 1975981 at *13 (6th Cir., July 10, 2007).

[67] 147 F.3d 1352 (Fed. Cir. 1998).

[68] 147 F.3d at 1355.

[69] 147 F.3d at 1355.

> When Earth Island expressly withdrew its motion, nothing remained for the trial court to resolve. ...
>
> The controversy between the parties ceased when Earth Island withdrew its motion.

147 F.3d at 1356.

But, the Sixth Circuit tried to distinguish Earth Island by saying that the parties there stopped litigating after Earth Island withdrew its motion to enforce, but that the parties here continued to litigate after Bosley withdrew her motion to enforce.

The Sixth Circuit's attempted distinction is invalid. The "presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself" to sustain federal jurisdiction.[70] Even where all parties "vehemently deny" that a case is moot, their insistence upon litigating can't keep a moot case alive.[71] Although there's "no want of an adversary contest," the court can't proceed to rule after a mooting event.[72]

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[70] *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

[71] *Nat'l Labor Rltns Bd. v. Globe Security Srvcs, Inc.*, 548 F.2d 1115, 1117 (3d Cir. 1977).

[72] *DeFunis v. Odegaard*, 416 U.S. 312, 315, 320 (1974) and 349 (Brennan, J., joined by Douglas, White, and Marshall, JJ., dissenting); *Kremens v. Bartley*, 431 U.S. 119, 127, 134 (1997).

Litigants cannot "by stipulation" overcome the mootness doctrine.[73]

Thus, what matters isn't whether the parties continue to vigorously disagree, or continue to file motions, or even if the trial court continues to rule. What matters is whether the controversy remains *justiciable* – whether Article III and other sources of federal subject-matter jurisdiction *empower* the judge to rule.

Here, neither Bosley nor the court of appeals or district court cited any authority beyond Kokkonen's dicta that Article III empowered the district court to grant Bosley's settlement motion after she withdrew it. Even a consent decree, which would afford more expanded jurisdiction than the bare retention of jurisdiction at issue here, can't "suspend the application of Article III."[74]

II. The Sixth Circuit and the district court failed to identify a valid ground for the district court to dismiss the case with prejudice and to invoke jurisdiction to resolve settlement disputes when no party asked for either.

Neither Kokkonen nor the federal rules empower the district court to dismiss a case with prejudice *sua*

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[73] *Sosna v. Iowa*, 419 U.S. 393, 398 (1975); *California v. San Pablo & Tulare RR Co.*, 149 U.S. 308, 314 (1893).

[74] *United States v. Accra Pac, Inc.*, 173 F.3d 630, 633 (7th Cir. 1999).

sponte while *sua sponte* retaining "continuing jurisdiction" to resolve future settlement disputes.

Kokkonen said: "If the parties *wish* to provide for the court's enforcement of a dismissal-producing settlement agreement," they have two options under two different Rule 41 dismissal scenarios.[75] Kokkonen offered no other options, and said that the failure to satisfy either option means that nondiverse parties have no ground for disputing settlement contracts in federal court.[76]

Under the first option, if plaintiff seeks dismissal after the defendant has answered the complaint or moved for summary judgment, the court could condition the dismissal on the court retaining jurisdiction over settlement or incorporating the terms in the dismissal order. The court can do that because Civil Rule 41(a)(2) empowers it to add "terms and conditions as the court deems proper."[77]

In the second option, the parties could stipulate to a dismissal in which the court has jurisdiction over settlement disputes, but only "if the parties agree."[78] The Court relied on Rule 41(a)(1)(ii), which allows the parties to stipulate to voluntary dismissals.

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[75] *Kokkonen*, 511 U.S. at 381-82 (emphasis in original).

[76] 511 U.S. at 382.

[77] *Kokkonen*, 511 U.S. at 381.

[78] *Kokkonen*, 511 U.S. at 381-82.

But that rule does not authorize district courts to impose its own conditions *sua sponte* on the parties' stipulation.[79]

Here, neither Bosley nor WFMJ sought a dismissal with prejudice or the court's retention of jurisdiction over future settlement disputes.

Because the district court based its dismissal with prejudice on WFMJ's unilateral notice of an effective agreement with Bosley to settle, the court's dismissal most closely resembles a dismissal by stipulation under Rule 41(a)(1)(ii). It is not like a post-answer dismissal in which the court can impose conditions on a plaintiff's unilateral request to dismiss -- Rule 41(a)(2). That's because the plaintiff here – Bosley – made no such request.

By *sua sponte* reserving to itself jurisdiction to resolve disputes over a not-yet consummated settlement, the district court altered a fundamental component of whatever private consensus the parties had reached. The parties had not negotiated that the district judge would be the final arbiter of their future settlement disputes. WFMJ did not agree with Bosley to surrender any right to seek redress from an Ohio court if future contract disputes developed. So, the district court's self-invoked "continuing jurisdiction" over settlement effectively grafted a forum-selection

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[79] *Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 911, 916 (2d Cir. 1998); 8 Moore, Moore's Federal Practice, § 41.34[3] (3d ed. 2007). *Compare* Rule 41(a)(1), *with* Rule 41(a)(2).

clause onto the parties' alleged agreement, potentially excluding relief from state court.

District courts are not empowered to alter perceived private settlement agreements by interjecting terms "that the parties neither anticipated nor negotiated," much less adopting them in an order.[80]

The district court's bold exercises of judicial power here *sua sponte* exemplify the kind of "standardless discretionary judicial acts" spawned by Kokkonen's dicta.[81]

III. Because WFMJ has paid the full amount of the settlement to Bosley only to comply with the judgment of the court of appeal, this petition is not moot.

After the Sixth Circuit issued its opinion and judgment affirming the district court's granting of Bosley's motion to enforce settlement, WFMJ paid the full settlement amount in compliance with both courts' judgments.

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[80] *Gardiner v. A.H. Robbins Co.*, 747 F.2d 1180, 1189-90 (8th Cir. 1984).

[81] *See* Parness & Sennott, 64 U. Pitt. L. Rev. at 320.

But it is hornbook federal law that a losing party's compliance with a judgment does not, by itself, bar further appeal.[82]

Although compliance could moot an appeal in certain instances (*e.g.*, where compliance cannot be undone), the "easiest cases" to determine whether an appeal is moot "involve[ ] the payment of a money judgment pending appeal."[83] Those cases are not moot because the judgment debtor can seek repayment if the judgment is reversed or vacated.[84]

Well over a century ago, this Court established:

> There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring

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[82] *Mancusi v. Stubbs*, 408 U.S. 204, 205-07 (1972) (obeying circuit court's judgment by re-sentencing defendant did not moot State of New York's appeal); *Bakery Sales Drivers Local Union No. 33 v. Wagshal*, 333 U.S. 437, 442 (1948) (obeying district court's injunction by lifting boycott did not moot union's appeal).

[83] 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.2, at 248 (2d ed. 1984).

[84] *E.g.*, *Dale M. v. Bd. of Educ. of Bradley-Bourbonnais High School Dist. No. 307*, 237 F.3d 813, 815 (7th Cir. 2001) (Posner, J.); *United States ex rel. Morgan & Son Earth Moving, Inc. v. Timberland Paving & Construction Co.*, 745 F.2d 595, 598 (9th Cir. 1984); *see also* Restatement (First) of Restitution § 74 (observing that "a person who has conferred a benefit upon another in compliance with a judgment . . . is entitled to rescission if the judgment is reversed or set aside").

> a writ of error to reverse it, and if reversed can recover back his money.

Dakota County v. Glidden, 113 U.S. 222, 224 (1885).

Even the party accepting the payment of the amount of a judgment does not lose the right to challenge the judgment solely because of that acceptance.[85]

Thus, a party who does not get a stay of the circuit court's mandate can still appeal to this Court.[86]

Here, WFMJ did not seek a stay of the mandate. Instead, it paid Bosley in obedience to the Sixth Circuit's judgment, which affirmed the district court's order granting Bosley's motion to enforce the disputed settlement. WFMJ told Bosley that it would pay the money in compliance with the judgment. WFMJ said:

> Unconditional offer to pay
>
> The court of appeals' opinion is to affirm the district court's order granting Ms. Bosley's motion to enforce settlement and we anticipate the court of appeals to issue a mandate consistent with that opinion.

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[85] *U.S. v. Hougham*, 364 U.S. 310, 312 (1960).

[86] *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 467 (1947); *Carr v. Zaja*, 283 U.S. 52 (1931) (Holmes, J.).

> In obedience to the court of appeals' opinion and anticipated mandate, we offer to pay the entire settlement amount plus post-judgment interest (which this letter describes in more detail later).

(App. 65a.) The letter closed: "This offer is not contingent upon your clients or their counsel signing any legal instrument or agreeing to anything except what we would need to document and facilitate payment."[87]

WFMJ termed this an "unconditional offer to pay" because Bosley did not have to exchange anything or surrender any right to receive payment. Therefore, it was not a settlement; it was nothing more than obedience to the circuit court's judgment.

WFMJ did not suggest that it was relinquishing its rights to seek certiorari, nor did it offer to do so. Because WFMJ paid in obedience to the circuit court's judgment, WFMJ has a right to seek restitution from Bosley if this Court causes the district court to vacate its settlement order. Thus, this petition cannot be moot.

CONCLUSION

This Court should grant this petition for a writ of certiorari.

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[87] (App. 70a.)

Respectfully submitted,

David L. Marburger
Counsel of Record
Matthew J. Cavanagh
BAKER & HOSTETLER LLP
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114
(216) 621-0200

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 06-3091, 06-3624, 06-3625, 06-3626, 06-3894, 06-3895

[Filed July 13, 2007]

CATHERINE BOSLEY, also known as Catherine Balsley, and RICHARD BROWN,	)
Plaintiffs-Appellees,	)
v.	)
21 WFMJ TELEVISION, INC., MICHELLE NICKS, and JOHN URCHEK,	)
Defendants-Appellants.	)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: GIBBONS and COOK, Circuit Judges; CLELAND, District Judge.*

JULIA SMITH GIBBONS, Circuit Judge. Plaintiffs-appellees Catherine Bosley and Richard Brown (collectively "plaintiffs") brought the instant action raising a copyright infringement claim and a number of other state law claims. Defendants-appellants 21 WFMJ Television, Inc. ("21 WFMJ"), Michelle Nicks, and John Urchak (collectively "defendants") challenge orders of the district court: (1) denying defendants' motions for summary judgment as to plaintiffs' claims and granting plaintiffs' motion for summary judgment as to defendants' counterclaim; (2) granting plaintiffs' motion to enforce an oral settlement agreement; and (3) denying Nicks's and 21 WFMJ's two joint motions requesting that the district court judge recuse himself.

For the reasons that follow, we (1) affirm the district court's order enforcing the parties' oral settlement agreement in accordance with the terms specified in that order; (2) affirm the district court's denial of the motions for recusal; and (3) dismiss the remainder of the appeal as moot.

I.

The events giving rise to the instant suit involve the copying and distribution of a video in which Bosley was depicted in a state of undress while participating

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* The Honorable Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

in a wet T-shirt contest at a bar in Key West, Florida. The proceedings in the district court have been extensive and rancorous, and while the parties vigorously dispute the merits of their claims, the underlying facts relevant to these merits issues are, for the most part, unnecessary to the disposition of this appeal. We instead must focus our attention on the proceedings below and the facts related to the parties' settlement negotiations as our ultimate finding that the parties did reach a full settlement of all claims obviates any need to resolve the parties' dispute over the merits of their claims.

Plaintiffs filed suit against defendants on December 23, 2004. Following the parties' motions for summary judgment, the district court denied summary judgment on plaintiffs' claims as to both parties and granted summary judgment to plaintiffs on defendants' counterclaim. On November 25, 2005, several days before trial was scheduled to begin, defendants notified the district court that the parties had effectively settled their dispute and advised the court that there was no need to impanel a jury. Following defendants' notice, the district court, *sua sponte*, dismissed the case with prejudice, retaining jurisdiction over any settlement disputes or disputes involving the parties' memorialization of the settlement terms. Defendants filed a timely notice of appeal as to this dismissal in which they challenge the district court's rulings on the parties' motions for summary judgment.

In the interim, the parties attempted to finalize their settlement agreement, but a dispute arose as to its terms. On January 9, 2006, plaintiffs filed a motion seeking enforcement of the parties' settlement

agreement and alleging that defendants were attempting to modify the terms of settlement and add additional terms to which the parties had never agreed. The district court referred that motion to a magistrate judge, and the magistrate judge conducted an evidentiary hearing on January 30, 2006. In his report and recommendation, the magistrate judge recommended that the district court find that the parties settled their dispute according to the terms outlined therein and grant plaintiffs' motion. The district court adopted the report and recommendation in full. The district court also denied two joint motions filed by Nicks and 21 WFMJ seeking recusal of the district court, one of which was filed before the district court adopted the report and recommendation and one of which was filed after. Defendants filed timely notices of appeal as to each of these rulings.

II.

As a threshold matter, we must address defendants' challenge to the propriety of the district court's exercise of jurisdiction over the plaintiffs' motion to enforce settlement. Relying upon the reasoning of *Earth Island Inst. v. Albright*, 147 F.3d 1352 (Fed. Cir. 1998), defendants contend that plaintiffs unconditionally withdrew their motion to enforce the oral settlement agreement, rendering their motion moot and depriving the district court of subject matter jurisdiction. Accordingly, defendants argue, we should vacate the district court's order granting plaintiffs' motion. In *Earth Island*, the Federal Circuit held that a movant's unconditional withdrawal of its pending motion deprives the district court of subject matter jurisdiction over that motion and prevents the district

court from rendering a decision on the merits. 147 F.3d 1356-57.

Defendants' mootness argument has its genesis in three documents plaintiffs filed with the district court between January 19 and 20, 2006. On January 19, plaintiffs filed two items: (1) a notice that plaintiffs intended to withdraw their motion requesting that the district court enforce the parties' oral settlement agreement and (2) a motion requesting that the district court set aside its judgment of dismissal and set a new date for trial. The docket entry for the former filing identifies it as having been "FILED IN ERROR." The docket entry also states that the plaintiffs will refile the document as a motion. On January 20, plaintiffs filed a document identical in all respects to the original notice of withdrawal except that it is captioned on the docket sheet as a motion.

On different facts, defendants' argument would be more compelling. However, the case before us is distinguishable from *Earth Island*, and that decision has no bearing on our decision today. In that case, after the plaintiff sent a letter to the court explaining its intent to withdraw the motion for summary judgment, the district court ignored the unequivocal language contained in the correspondence and recharacterized the filing as a petition for leave to withdraw, which it in turn denied. *Earth Island*, 147 F.3d at 1356. Furthermore, following Earth Island's letter, no further action was taken by either party, and eighteen days later, the district court simply issued an opinion granting Earth Island's original motion. *Id.*

While there can be no doubt that the document filed with the district court expresses a unilateral desire on the part of the plaintiffs to withdraw their motion, the similarity between this case and *Earth Island* ends there. First of all, the first of the two documents is listed as erroneously filed, and the second is captioned as a motion. Of course, errors in docketing are not unheard of, but it is telling that neither the parties nor the court treated this second filing as a withdrawal of plaintiffs' pending motion. The voluminous filings and rather vigorous disagreement between the parties over whether and under what terms the parties had settled confirm that the controversy was not moot. In fact, when pressed on this point at oral argument, defendants' counsel effectively conceded that whatever plaintiffs' position may have been at the time the motions were filed, the frustration they felt in attempting to enforce settlement that prompted their efforts to withdraw their motion had been alleviated, and plaintiffs were prepared to litigate the dispute over settlement. Quite simply, the fifteen months of continued litigation belies any claim by defendants that the settlement dispute was no longer live. We therefore see no error in the district court's exercise of jurisdiction over plaintiffs' motion.

III.

We now turn to the defendants' claim that the district court erred in granting plaintiffs' motion to enforce settlement.

A.

In reviewing a district court's decision to grant a party's motion to enforce an oral settlement agreement, this court reviews the district court's factual determination that the parties have agreed to settlement and of the terms of settlement for clear error. *Re/Max Int'l, Inc. v. Realty One. Inc.*, 271 F.3d 633, 645 (6th Cir. 2001). We review a district court's decision to enforce that agreement based on these preliminary factual findings for an abuse of discretion. *Id.*; *Therma-Scan, Inc. v. Thermoscan, Inc.*, 217 F.3d 414, 418 (6th Cir. 2000). The fact that the parties have yet to reduce their agreement to writing is no bar to enforcement: "[w]hen parties have agreed on the essential terms of a settlement, and all that remains is to memorialize the agreement in writing, the parties are bound by the terms of the oral agreement." *ReMax*, 271 F.3d at 646 (citing cases).

An abuse of discretion exists when the reviewing court is "left with the definite and firm conviction that the [district] court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors or where it improperly applies the law or uses an erroneous legal standard." *Id.* at 645 (internal quotation marks omitted). A factual finding is clearly erroneous "where although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 825 (6th Cir. 2007) (internal quotation marks omitted).

B.

Plaintiffs first argue that defendants have waived their right to appeal the district court's adoption of the magistrate judge's report and recommendation because of their failure to object in a timely fashion. In *United States v. Walters*, this court held that a party's failure to object to a magistrate judge's report within the time provided for filing objections operates as a waiver of that party's right to appeal. 638 F.2d 947, 949-50 (6th Cir. 1981); *see also Thomas v. Arn,* 474 U.S. 140, 142 (1985) (approving *Walters* rule). However, this rule is procedural and not jurisdictional, and the court may excuse compliance with it in the interests of justice. *See Thomas*, 474 U.S. at 155.

Defendants concede the untimeliness of their objections, but they urge us to follow the rule adopted in *Patterson v. Mintzes*, 717 F.2d 284 (6th Cir. 1983). *Patterson* provides, in relevant part, "when written objections to a magistrate's report are tendered beyond the 10 day period . . . , but are nevertheless filed and considered by the district court, the criteria identified in *Walters* in justification of the waiver rule . . . dissipate[,] and the rule will not apply to bar appellate review." 717 F.2d at 286; *see also O'Neal v. Morris*, 3 F.3d 143, 144-45 (6th Cir. 1993), *vacated on other grounds sub nom.*, *O'Neal v. McAninch*, 513 U.S. 432 (1995).

The district court did not specifically address the merits of each objection raised by the defendants and expressly refused to allow the defendants to file untimely objections, granting plaintiffs' motion to strike the objections as untimely filed. Thus, there is

an argument that *Patterson* is not controlling in this case. However, a review of the district court's order reveals that the court did address defendants' principal objections to the report and recommendation even though it was under no obligation to do so. As a matter of substance, if not form, the district court elected to address defendants' objections. Accordingly, we do not believe that the record before us justifies application of the *Walters* rule and will therefore address the merits of defendants' appeal.

C.

The record before us provides ample evidentiary support for the district court's factual findings regarding the terms of and the parties' entry into a settlement agreement. Moreover, defendants have provided no evidence that would call the district court's findings into question. Therefore, as explained below, we find no error in the district court's decision to grant plaintiffs' motion to enforce settlement.

As an initial matter, defendants argue that the district court erred in its overall finding that the parties reached agreement as to the essential terms of settlement. Defendants characterize the conversations between Andrew Kabat, counsel for plaintiffs, and Stephen Bolton, counsel for defendants — found by the district court to have established the essential terms of the agreement — were little more than preliminary negotiations. Defendants further assert that it was improper and inequitable for the district court to hold the parties to obligations allegedly incurred during these negotiations, the product of which was an incomplete contract. Defendants do not identify,

however, what elements were missing from the agreement at the time they notified the district court that there was no need to impanel a jury because the case had been settled. Defendants seem to assume that because they would have preferred that the agreement contain terms different from those agreed upon by Bolton and Kabat, the agreement must necessarily be incomplete, and as a consequence, there was no meeting of the minds. Just as the district court observed, however, the objective acts of the parties do not support defendants' position. *See Re/Max*, 271 F.3d at 646 (noting that even though the parties had not yet formalized their agreement in writing, their "objective acts . . . reflect[ed] that an agreement had been reached").

Days before trial, defendants filed a "Notice of Settlement," notifying the court that there was no need to impanel a jury because the parties had "effectively reached a settlement." This notice did not state that the parties were *close* to settlement or that talks were *on the verge* of producing an agreement. Rather, the defendants themselves stated that agreement had effectively been reached and that the process of drafting documents had begun. Moreover, the notice contained no hint that settlement was contingent on the negotiation of additional terms or, as defendants' counsel asserted at oral argument, the actual memorialization of the agreement terms in a written document. Defendants make much of their use of the word *effective* in the notice filed with the district court. While this may communicate some degree of equivocation, it provides little support for defendants' claim that settlement was somehow contingent on the negotiation of additional material terms. In addition,

neither party objected when the district court, upon receipt of defendants' notice, dismissed the case with prejudice, retaining jurisdiction only to resolve any disputes over settlement terms. A settlement agreement, like any other contractual arrangement, depends upon objective, not subjective, manifestation of intent. *See Therma-Scan, Inc.*, 217 F.3d at 420 (citing *United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252, 1258 (5th Cir. 1990)). By all appearances, the parties operated as if their dispute had been resolved. Defendants point to nothing in the record — beyond their own undisclosed subjective intent — that would call the district court's finding of an agreement into question, much less support a finding of clear error.

The district court found that the parties agreed to the following terms: (1) payment of a specified amount by defendants to plaintiffs; (2) confidentiality as to that amount; (3) mutual release of all claims against all parties; (4) plaintiffs' release of all parties named in their complaint, including those not specifically identified; and (5) language in the judgment of settlement indicating that costs of the litigation would be paid by the plaintiffs.

In the report and recommendation adopted by the district court, the magistrate judge conducted a thorough examination of the evidentiary record compiled by the parties. The magistrate judge laboriously documented the evidentiary support for each term identified above, noting that each was corroborated in the testimony of both Kabat and Bolton.

With respect to the confidentiality term of the settlement, defendants argue that the district court clearly erred in finding that the confidentiality provision was limited to the sum to be paid plaintiffs by defendants. Defendants direct our attention to portions of Bolton's testimony suggesting that he and Kabat never discussed confidentiality except insofar as it related to the amount of the settlement and that the defendants never intended to limit the confidentiality provision only to the amount of settlement. Of course, as the magistrate judge observed, Kabat testified that he explained to Bolton that plaintiffs were willing to agree to confidentiality only as to the *settlement amount*. Bolton further testified that he understood Kabat's position and that he acquiesced to it. Defendants argue that Bolton never intended to limit the confidentiality provision in this manner and that he simply expected to work out the rest of the details as a later date; however, as Bolton acknowledged, he never made Kabat aware of his intentions during their conversations.

As to the mutual release, defendants argue that they never intended to release their counterclaims against Bosley. According to defendants, because Kabat and Bolton never discussed the specific claims that would be affected by the parties' mutual releases, it was error for the district court to hold that the parties effected a mutual release of all claims by all parties. Bolton acknowledged in his testimony that, though not his intent at the time, a "reasonable" interpretation of a "mutual release" term includes a release of all claims by all parties, including counterclaims by a defendant.

At its core, defendants' argument as to both of these matters rests on a single assumption: because the district court's factual findings conflict with Bolton's undisclosed and subjective understanding of the terms of the agreement negotiated with Kabat, the district court clearly erred. Thus, under the approach advocated by defendants, the district court erred not because the terms of the agreement found by the court lack evidentiary support but rather because the district court did not view the evidence through the lens of defendants' counsel.

Defendants' position is untenable. The fact that the defendants are now unhappy with the bargain they made is insufficient to support a finding of clear error. There is nothing in the evidentiary record that would suggest that Bolton's position on these issues was communicated to Kabat during the settlement negotiations, constructively or otherwise. Defendants' efforts to avoid their bargain on the theory that Kabat's failure to delve into Bolton's internal state of mind excuses their performance are unavailing. The district court did not err in its findings regarding the terms of the parties' agreement.

Finally, defendants argue that the district court erred in enforcing the settlement agreement because Kabat failed to disclose Bosley's intentions to publish the fact of the settlement in a television appearance. According to the defendants, Kabat's failure to disclose Bosley's intention to appear on the Oprah Winfiey Show and make statements about the settlement of her case even though Kabat knew of the defendants' desire for confidentiality constituted fraud. Defendants' argument is meritless. As noted above,

Kabat made clear to Bolton that plaintiffs were willing to keep *only* the *amount* of the settlement confidential. Bolton did not pursue the matter further, and the mere fact that Kabat did not disclose Bosley's plans to publicize the settlement is immaterial. Defendants were well aware of the plaintiffs' position on confidentiality. They had every opportunity to negotiate a broader confidentiality provision yet elected not to do so. The mere fact that defendants would have preferred to know about Bosley's intentions hardly suffices to establish that Kabat had a duty to disclose this information, much less suffices to make out a claim of fraud.

Upon review of the entire record, there can be little doubt that the district court correctly found the existence of an enforceable settlement agreement. The district court also committed no error in resolving the parties' dispute over the terms of that agreement. On this record and in the absence of any showing by the defendants that the district court committed error, we see no abuse of discretion in the district court's decision to enforce the parties' agreement.

IV.

We next address the claim by Nicks and 2 1 WFMJ that the district court cned in denying their two joint motions for recusal.

A.

This court reviews a district court's denial of a motion to recuse for an abuse of discretion. *Wheeler v. Southland Corp.*, 875 F.2d 1246, 1251 (6th Cir. 1989);

see also Bell v. Johnson, 404 F.3d 997, 1004 (6th Cir. 2005). The Wheeler court observed,

> The law with regard to recusal under section 455 is straightforward and well-established in the Sixth Circuit. A district judge is required to recuse himself only if a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. This standard is objective and is not based on the subjective view of a party.

Id. (internal citations and quotation marks omitted). Moreover, "[i]n order to justify recusal under 28 U.S.C. § 455, the judge's prejudice or bias must be personal or extrajudicial. Personal bias is prejudice that emanates from some source other than participation in the proceedings or prior contact with related cases." *United States v. Jamieson*, 427 F.3d 394, 405 (6th Cir. 2005) (internal citation and quotations marks omitted); *see also Youn v. Track, Inc.*, 324 F.3d 409, 423 (6th Cir. 2003). However, even bias that is not "extrajudicial" may be so "extreme as to display clear inability to render fair judgment," requiring recusal of a judicial officer. *Liteky v. United States*, 510 U.S. 540, 551 (1994).

B.

Defendants first argue that the district court should have recused itself because of its prior involvement in

a related case, *Bosley v. Wildwett. com.*[1] According to the defendants, Judge Gwin was responsible for helping facilitate the agreement that resulted in the settlement of that case. As part of that settlement and in exchange for a reduced cash payment, Bosley received any copyright in the video that gave rise to this litigation held by DreamGirls, Inc. — one of the defendants[2]. Defendants further contend that it was Judge Gwin who first suggested the possibility of this transfer to the parties. Because Judge Gwin was involved in the prior settlement, defendants argue, he has an "implied commitment to vindicat[e] Bosley's exploitation of the purported copyright in this case." Moreover, according to defendants, "[t]hat implied stake ranges from sustaining Bosley's ability to sue on the copyright, to ensuring a favorable climate for settlement, making up for the cash shortfall [resulting from the prior settlement]."

The record provides no basis for defendants' claim of bias. Other than their own speculation, defendants

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[1] In addition to its ruling on the merits, the district court determined that the defendants failed to file their second motion within a reasonable time after they learned of the grounds for recusal. Judge Gwin's observations about defendants' delay in bringing this ground for recusal to the court's attention only bolster his decision not to grant defendants' second motion. Defendants dispute the point at which they became aware of Judge Gwin's involvement in the prior action. However, because defendants' argument on appeal as to the merits is not well taken, there is no need to resolve the matter.

[2] It is this copyright that Bosley sought to vindicate in the instant suit.

offer no support for their claim that Judge Gwin had such an implied obligation. They point to nothing in the record that would suggest Judge Gwin had somehow become invested in Bosley's lawsuit against them. In the absence of any evidence to suggest that Judge Gwin was incapable of impartially adjudicating the case before him, the mere fact that the defendants believe that Judge Gwin has some interest in seeing Bosley's action succeed does nothing to advance their argument that Judge Gwin erred in refusing to recuse himself.

As before the district court, defendants have identified only two cases that involve a factual scenario that is even remotely similar to the one before us. In each case, the district court *voluntarily* recused itself after determining that its prior involvement with settlement negotiations warranted exercising caution. *Black v. Kendig,* 227 F. Supp. 2d 153, 155-56 (D.D.C. 2002) (magistrate judge recused himself from dispute over terms of settlement where he had supervised settlement negotiations); *Day v. NLO,* 864 F. Supp. 40, 43 (S.D. Ohio 1994) (disagreeing with the idea that a "trial judge who has participated in settlement negotiations is necessarily incapable of reviewing that settlement" but recusing himself fiom Rule 23(e) fairness proceeding "out of an abundance of caution"). These cases, while in some ways similar, implicate somewhat different concerns. In each case, the judges' decisions to recuse were motived by concern over their ability to remain impartial in reviewing settlements in which they played a part in crafting. Whatever this authority may have to say about situations where voluntary recusal would be prudent, it offers little guidance as to the propriety of Judge Gwin's decision

not to recuse in this particular case. Offering little more than conjecture, defendants conclude that no reasonable person could but doubt Judge Gwin's impartiality. Neither case law[3] nor common sense supports defendants' position, and Judge Gwin did not abuse his discretion in declining to recuse.

Defendants offer a second and independent ground in support of their claim that the district court should have recused. They claim that certain comments made by Magistrate Judge Limbert prior to the evidentiary hearing on plaintiffs' motion to enforce settlement demonstrated that the district court was incapable of rendering an impartial decision. According to defendants' declarations filed with the district court, Judge Limbert disclosed to the parties that Judge Gwin had instructed him to find that the parties had agreed to settle their dispute under certain terms and that the evidentiary hearing requested by defendants would be of little consequence. Moreover, defendants stated that Judge Limbert informed them that Judge

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[3] In their briefing, defendants also draw on general principles of fairness that demand a judge be recused where he or she is called upon to review independently his or her own judicial rulings. They argue that this principal applies with equal force to the facts of this case. The cases cited by defendants have no bearing on this case. Judge Gwin made no determination in the prior lawsuit as to the validity of any copyright held by Bosley; he simply helped to mediate and approved of a settlement whereby one of the defendants in Bosley's first lawsuit "agreed to assign to [her] whatever copyright it had, without warranty, in video of Bosley." Thus, defendants' contention that the instant suit required Judge Gwin to review the propriety of his prior ruling is incorrect, and the cases upon which they rely in this regard are inapposite.

Gwin would not set the matter for trial or otherwise disturb his prior dismissal order because he had determined that the parties' dispute was settled.

The crux of defendants' argument is that these statements demonstrate that Judge Gwin held such deep-seated predisposition as to the proper outcome of the parties' dispute as to render impossible any fair judgment. *See, e.g., Liteky*, 510 U.S. at 551; *United States v. Howard*, 218 F.3d 556, 566 (6th Cir. 2000) ("A predisposition acquired by a judge during the course of the proceedings will only constitute impermissible bias when 'it is so extreme as to display clear inability to render fair judgment.'") (quoting *id.*). Were the facts of this particular case confined to those outlined in defendants' declarations, their argument might have more traction.

However, given defendants' allegations that Judge Limbert's comments called into question the possibility of a fair resolution of the settlement issue, it is perplexing that they waited nearly six weeks before first drawing the court's attention to Judge Limbert's statements and almost two months before filing their recusal motion[4]. Defendants claim that, following Judge Limbert's disclosure, they had every reason to believe that the outcome of plaintiffs' motion to enforce

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[4] According to defendants, Judge Limbert conveyed this information on January 30, 2006. The first reference to Judge Limbert's alleged revelation appears in defendants' declarations filed in support of a motion to supplement the record filed on March 13, 2006, and their motion for recusal was not filed until March 27, 2006.

settlement was predetermined and that they could not possibly receive a fair hearing. Although defendants claim that by all appearances, the result was foreordained, their concerns did not motivate them to question the impartiality of the court for nearly two months — almost one month after Judge Limbert issued his report and recommendation. While not dispositive, the delay in filing undercuts defendants' claims significantly. *See In re City of Detroit*, 828 F.2d 1160, 1167-68 (6th Cir. 1987) ("Timeliness is a factor that obviously merits consideration by a court that is trying to determine whether ajudge is truly biased or a litigant is merely trying to avoid an . . . adverse decision."), *overruled in part on other grounds by In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136, 1140-43 (6th Cir. 1990) (en banc).

Moreover, in his order denying defendants' recusal motion, Judge Gwin stated that he never instructed Judge Limbert to come to any specific resolution of the case. To the contrary, Judge Gwin stated,

> [i]n referring the matter, the Court did not direct Magistrate Limbert to reach any particular decision. This Court has no authority to tell any judicial officer to make any decision. Having read the parties submissions before referring the motion, the Court no doubt indicated [what was] apparent — Defendants had an obviously weak argument. Repeating, at the time of the referral, Defendant's only argument recognized the parties had reached settlement on major terms but claimed it could avoid settlement over some undiscussed and unreserved term.

In addition, as Judge Gwin observed, the Supreme Court has recognized that judges may properly form opinions "on the basis of facts introduced or events occurring in the course of the current proceedings . . . unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555.[5]

Also undercutting defendants' claim of judicial bias is the thoughtful and thorough analysis that has been conducted at each stage of this litigation. The magistrate judge thoroughly analyzed the factual record before him and found corroboration for his ruling in the testimony of counsel for both parties. The district court, though under no obligation to review defendants' untimely objections, thoughtfully and thoroughly reviewed the report and recommendation and explained why defendants' position should be rejected. The record before us does not support defendants' claim that they were denied a fair and impartial hearing. Accordingly, we find no abuse of discretion in the district court's denial of defendants' recusal motion.

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[5] Defendants argue that even though Judge Gwin disclaimed any prejudgment, it was not until after the issue of Judge Limbert's statements was raised that Judge Gwin did so. Thus, defendants argue, the *appearance* of prejudgment endured for a period of weeks. The period of apparent bias is attributable solely to defendants' own conduct in delaying their filing of a recusal motion or otherwise notifying the court of Judge Limbert's statements. Defendants may not now rely on their own dilatory behavior in support of their claim of bias.

V.

The remaining issues presented on appeal involve defendants' challenge to the district court's rulings on the parties' cross motions for summary judgment. Having determined that the district court committed no error in finding that the parties settled their dispute and effected a mutual release of all claims, any dispute as to the district court's prior rulings on the merits of the their claims have been rendered moot. We therefore need not reach the merits of the district court's disposition of the parties' summary judgment motions.

VI.

For the foregoing reasons, we (1) affirm the district court's order enforcing the parties' oral settlement agreement in accordance with the terms specified in that order; (2) affirm the district court's denial of the motions for recusal; and (3) dismiss the remainder of the appeal as moot.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CASE NO. 4:04-CV-2529

[Filed April 7, 2006]

CATHERINE BOSLEY, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
21 WFMJ, *et al.*	)
	)
Defendants.	)
	)

ORDER AND OPINION

[Resolving Doc Nos. 333, 347, 348, 371, 372, 380, 381]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

With their motion, the Plaintiffs move to enforce the settlement that they say the parties agreed to on November 23, 2005 [Doc. 333]. On February 24, 2006, Magistrate Judge George J. Limbert, on referral from

this Court, recommended that the Court enforce the settlement and grant the Plaintiffs' motion [Doc. 367]. Although the Defendants filed objections to the Report [Docs. 376-78], the Plaintiffs moved that they be stricken as untimely [Doc. 380]. The Defendants concede that the objections were untimely but move the Court to consider them anyway [Doc. 381].

For the reasons described below, the Court adopts the Magistrate's Report. The Court finds that the parties agreed, in their oral agreement of settlement, to the terms as outlined in the Magistrate's Report & Recommendation. Therefore, the Court GRANTS the Plaintiffs' motion to enforce the settlement agreement reached on November 23, 2005; DENIES the Plaintiffs' motion to vacate the Court's November 26, 2005 Order of Settlement; DENIES the Plaintiffs' motion to withdraw their motion to enforce the settlement agreement; DENIES the Defendants' motions to supplement the record; GRANTS the Plaintiffs' motion to strike the Defendants' objections; DENIES the Defendants' motion for leave to file objections to the Magistrate Judge's Report And Recommendation; and ADOPTS Magistrate Judge Limbert's Report & Recommendation in full.

I. Background

The history of this case is long and tumultuous. The Magistrate's Report & Recommendation provides a full recitation of the relevant facts. In brief, on November 23, 2005, the parties purported to reach an oral agreement to settle the case [Doc. 329]. Soon thereafter, the Plaintiffs filed the present motion to enforce the settlement agreement. With their motion

to enforce the settlement, the Plaintiffs contend that Defendants attempted to renege upon their contract to settle the case by conditioning the execution of settlement documents upon Plaintiffs' agreement to additional terms never discussed and never agreed upon. [Doc. 333].

This Court referred the matter to Magistrate Judge George J. Limbert pursuant to Local Rule 72.1. On February 24, 2006, Magistrate Judge Limbert issued a Report & Recommendation. The Report recommends, *inter alia*, that the Court enforce the parties' oral settlement agreement.

On March 15, 2006, nineteen days after the Report issued, Defendants Michelle Nicks, John Urchek, and WFMJ Television, Inc. filed objections to the Report. The Plaintiffs moved to strike the objections as untimely [Doc. 380]. In response, the Defendants admitted that they miscalculated the deadline for filing their objections. Arguing that "excusable neglect" caused the delay, they asked the Court to consider their objections and review the magistrate's Report and Recommendation. [Doc. 381].

II. Standard of Review

The Sixth Circuit holds that a district court bears no obligation to review a magistrate's report unless a party has filed a timely objection. *Thomas v. Arn*, 474 U.S. 140, 145 (1985). Absent objection, a district court may adopt the magistrate's report without review. *Id.* at 149. Therefore, as a threshold matter the Court determines whether the Defendants' untimely

objections to the Magistrate's Report should be stricken.

III. Analysis

A. Whether Untimely Objections Should be Considered

The Federal Rules of Civil Procedure state that "[w]ithin 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made." Fed. R. Civ. P. 72(a). Rules 6(a) and 6(e) elaborate on the process for calculating the allowed time. Fed. R. Civ. P. 6(a),(e). Under the proper computation, the parties had until March 13, 2006 to object to the Report. The Defendants admit that they filed their objection two days past this deadline, on March 15, 2006.

The Sixth Circuit has interpreted Rule 72 to mean that a party that fails to file its objections within ten days of service (using the Rule 6 calculation method) waives its right to appeal. *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981) (holding that "a party shall be informed by the magistrate that objections must be filed within ten days or further appeal is waived"). Moreover, Northern District of Ohio Local Rule 72.3(b) states that "failure to file timely objections within the ten (10) day period shall constitute a waiver of subsequent review, absent a showing of good cause for such failure."

Under some circumstances, a court may consider an untimely filed objection. Federal Rule of Civil Procedure 6(b) describes the method for calculating filing deadlines and the conditions under which a court may modify those deadlines. The Rule provides that "where the failure to act was the result of excusable neglect" a court may enlarge the time period. Fed. R. Civ. P. 6(b). And Local Rule 72.3(b) allows the late-filing party to avoid waiver of review upon "a showing of good cause" for the failure to timely object[1]. The Court therefore determines whether the Defendants show "excusable neglect" or "good cause" for their untimely objections.[2]

To find excusable neglect, a court need not find that circumstances beyond the party's control caused the late filing. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 392 (1993). However, the Supreme Court holds that "mistakes construing the rules do not usually constitute 'excusable' neglect." *Id.*

Here, the Defendants do not allege that any hardship or unusual external circumstances

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[1] Federal Rule of Civil Procedure 6(b) does not apply to local rules of court. *Kallay v. Cmty. Nat'l Life Ins. Co.*, 52 F.R.D. 139, 142 (N.D. Okl. 1971). Therefore, the "excusable neglect" standard applies only to Federal Rule of Civil Procedure 72(a) in this case and not to the time period established by Northern District of Ohio Local Rule 72.3(b).

[2] The "good cause" standard is generally less stringent than the "excusable neglect" standard. *See Dimmitt v. Ockenfels*, 407 F.3d 21, 24 (1st Cir. 2005).

contributed to their delinquency. Their only justification for their tardiness is their misunderstanding of the rules. The Defendants go to great lengths to argue that their interpretation was common, and thus reasonable. However, as the Plaintiffs' point out, well-known and readily accessible legal authority describes the proper interpretation of the relevant rule:

> Rule 6(e) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. Three days are added after the prescribed period otherwise expires under Rule 6(a). Intermediate Saturdays, Sundays, and legal holidays are included in counting these added days.

Fed. R. Civ. P. 6(e) advisory committee's note. Moreover, the note gives an illustration that is largely similar to the present situation:

> Application of Rule 6(e) to a period that is less than eleven days can be illustrated by a paper that is served by mailing on a Friday. If ten days are allowed to respond, intermediate Saturdays, Sundays and legal holidays are excluded in determining when the period expires under Rule 6(a). If there is no legal holiday, the period expires on the Friday two weeks after the paper was mailed. The three added Rule 6(e) days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday.

Id. This language, of which the Defendants should have been aware, leaves no room for the Defendants' misinterpretation.

Moreover, by filing their objection on what they believed was the deadline based on a relatively sophisticated calculation process, the Defendants assumed the risk that they would be mistakenly untimely file. The Defendants were well aware of the potential difficulty in determining the proper deadline: Defendant WFMJ Television was forced to re-file its intention to object [Doc. 369] after having already misinterpreted the rule once. Therefore, the Defendants cannot claim to have been completely caught unaware; they had already wrestled with question of the proper computation. They were on notice of the nature of the computation and the risk of failing to properly compute the time. Despite this, they chose to err not on the side of caution, but of risk.

As stated, "mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer Inv. Servs.*, 507 U.S. at 392. For the reasons described above, this case presents no basis for an exception to that rule. The Defendants' objections were untimely and are stricken.

Because no party filed a valid objection to the Magistrate's Report & Recommendation, this Court need not review the Magistrate's findings. *Thomas*, 474 U.S. at 145. Instead, the Court may – and does – adopt the Report without review. *Id.*

B. The Magistrate's Report Reviewed

Even if the Court were required to review the Magistrate's report, the Court would still adopt the Magistrate's recommendation. Upon review of the record and the Magistrate's Report, this Court finds the analysis thorough and the findings well-substantiated. The Defendants' objections to the Report do not persuade the Court otherwise, they approach the laughable. This Court therefore adopts Magistrate Judge Limbert's Report & Recommendation in full.

In that Report & Recommendation, Magistrate Judge Limbert found the parties had reached a settlement:

> [T]he parties in this case had indeed settled the entire case. Both of the attorneys who entered into the oral agreement consistently testified as to the essential terms of the oral settlement, including the agreed-upon amount that Defendants would pay Plaintiffs, confidentiality as to that amount, a mutual release of all claims by all parties, which the undersigned finds included Defendants' counterclaims, a release of every party named in Plaintiffs' complaint, which includes those individuals, "affiliates, employees, agents, parents, or subsidiaries of Defendants 21 WFMJ, WFMJ Television, Inc. . . . and/or entities otherwise associated with these Defendants who had the right and ability to supervise the activities alleged herein and received a direct financial benefits from this misconduct" and those "owners, officers,

> employees, and/or agents of Defendants 21 WFMJ, WFMJ Television, Inc. . . . who have directly or indirectly participated in the illegal distribution, copying, reproduction, selling, and/or illegal editing of copyrighted works owned by Plaintiffs and/or who had the right and ability to supervise the activities alleged herein and received a direct financial benefit from this misconduct. . .

[Doc. 367 at *5-6].

In reaching this recommendation, the Magistrate Judge relied upon uncontradicted evidence. Recall, the parties acknowledge agreement upon the amount of the settlement but disagreed regarding two elements of the settlement they had reached: 1) did the Defendants agree to waive any claim of confidentiality except as to the amount of the settlement; and 2) did the Plaintiff agree to release claims against parties associated with the Defendant although not specifically joined as a defendant.

Regarding the extent of the confidentiality agreement, Plaintiffs Attorney Kabat and Defense Attorney Bolton were the only parties to the conversation during which the settlement was reached. Plaintiffs Attorney Kabat described his discussion with Defense Attorney Bolton:

> A Our conversation [regarding confidentiality] was very simple. Mr. Bolton said to me, we need confidentiality. And I said to him, the only thing my client is willing to agree to is to keep the amount of the settlement confidential. He said to

me, that will work. That was the extent of the conversation.

(Hr'g Mot. Enforce Settlement, Tr. at 17, Jan. 30, 2006.)

Importantly, Defendant Attorney Bolton agreed that the sole agreement reached only required the Plaintiffs to keep the amount of the settlement confidential. He testified:

Q What I agreed to that night was to keep the amount of the settlement confidential; correct?

A That's what I just said.

Q Nothing more; nothing less; correct?

A I didn't understand that to be exclusive.

Q But there was nothing discussed?

A But there was nothing else to talk about. That was -- that was -- all we had talked about that night was price.

Q Correct. And you thought when you walked away, in your words, that that meant that the figure, the amount your clients were going to pay, was off limits; right?

A I thought that the figure could not be discussed or referred to; right.

Q Right. And when I said to you, I will agree not to disclose the amount of the settlement, the figure, you said, okay, that will work. Do you remember that?

A I don't remember saying that will work. What I remember saying is, that is reasonable.

(Hr'g Mot. Enforce Settlement, Tr. at 99, Jan. 30, 2006.) Defendant Attorney Bolton further testified:

Q And after talking to me, the only thing that we had reached an agreement on was to keep the price confidential; right?

A We had agreed to keep the one thing - - the one part of our agreement that we had actually come to terms on confidential, yes. I couldn't ask for more than that at the time.

(Hr'g Mot. Enforce Settlement, Tr. at 30, Jan. 30, 2006.)

With its filings and testimony, Defendants acknowledge that Bolton and Kabat agreed that only the amount of the settlement would be kept confidential. Defendants seem to contend that some unexpressed conditions needed to be included in the settlement contract before it became effective. In opposing the motion to enforce a settlement, Defendant WFMJ did not dispute the terms of the settlement claimed by Plaintiffs. Instead, the defendants argued that they should be permitted to bargain for additional

terms after agreement had been reached. Thus, Defendant WFMJ says:

> "In that conversation and thousands of other informal settlement talks like it, the lawyers agreed whether there would be a payment of an amount, and upon several major issues needed for a final settlement agreement. *They did not agree to confine all settlement terms to those addressed on the phone; nor did they agree to confine all settlement terms that they did discuss to the literal words uttered in the conversation.* "

[Doc. 334 at *3, Bolton affidavit at ¶ 8].

Obviously, this is wrong. Under contract law, courts consider objective manifestations of intent, not undisclosed desires. Whether there has been meeting of minds or mutual assent is judged by objective standard, looking to expressed words of parties and their visible acts. Expressions of assent are sufficient to show a meeting of the minds, irregardless of some hope that the other party might later agree to some additional undisclosed condition, especially where the undisclosed condition vary from the expressed agreement.

Defendant Counsel makes the disingenuous argument that the parties had not understood a settlement had been reached. The argument is belied in numerous ways as described by the Magistrate Judge. First, Defendant Attorney Marburger filed a notice saying: "Defendants WFMJ Television, Inc., Michelle Nicks, and John Urchak hereby notify the

Court that they have effectively reached a settlement with the plaintiffs. The documents consummating the settlement are being drafted now." [Doc. 329]. The filing nowhere said that negotiations were close but not closed. It nowhere made any request for additional time to complete claimed unfinished negotiations. Plaintiffs filed no objection to this notice. Obviously, the parties believed that a settlement was reached.

In reaction to this filing, the Court placed an order, saying, in part: "Upon representation of counsel that the above-captioned case has been settled between the parties, IT IS ORDERED that the docket be marked, "settled and dismissed with prejudice." [Doc. 331]. Neither Defendants, nor Plaintiffs filed any indication that the case had not been settled. In addition, for some reason, on December 27, 2006, Defendants filed a notice of appeal from certain of this Court's preliminary rulings. [Doc. 336]. In that filing, Defendants never contend that this Court erred in saying this case had been settled.

Attorney Bolton gave further testimony belying the argument that they did not understand a settlement had been reached. Referring the November 23, 2005, settlement conversation with Kabat, Bolton testified: "I do recall saying that I would try to provide a release or a settlement agreement, I don't remember which term I used, and a check within seven days." (Hr'g Mot. Enforce Settlement, Tr. at 91, Jan. 30, 2006.) This testimony begs the obvious question: if, as Defendants now contend, a settlement had not been reached, how could Bolton provide a release? If a settlement had not been reached, why would Bolton promise to get the settlement money to Kabat and

Plaintiffs within seven days? If a settlement had not been reached, why were no arraignments made to discuss the conditions that Defendant now say were unresolved?

Defendant Counsel's belated claim that they did not intend to fully settle the case is not believed. Although acknowledging that Bolton expressed agreement to the confidentiality provision that only limited disclosure of the dollar value of the settlement, Defendants suggest that it could refuse settlement if Plaintiffs refused to accede to additional, and previously not disclosed, conditions. However, settlements, like all other contracts necessarily are determined by overt expressions. Undisclosed reservations cannot trump expressed conditions. Here, both Defense Attorney Bolton and Plaintiffs Attorney Kabat agreed that only the dollar amount of the settlement would remain confidential. That Plaintiffs do not agree to some later proposal to add to the settlement terms does not invalidate the agreement as to the original terms. No evidence suggests that Defendants anyway conditioned their agreement to the settlement on the subsequent resolution of undisclosed conditions. The Magistrate Judge got it completely correct.

Defendants make one further argument regarding why the settlement agreement they reached should not be enforceable. Defendants suggest that Bosley misled them when she failed to advise them that she might appear on the Oprey Winfrey television show to

discuss the litigation[3]. In support of this argument, the Defendant show no material misstatement by Bosley's counsel, instead they argue Bosley had some duty to volunteer information that she might publicize the litigation.

Generally, silence cannot form the basis of a fraud claim. The failure to disclose a particular fact is only actionable where there exists a duty of disclosure. *See Burr v. Board of County Com'rs of Stark County*, 23 Ohio St.3d 69, 69, 491 N.E.2d 1101, 1102 (Ohio1986) (holding that the first element of a fraud in the inducement claim is "a representation or, where there is a duty to disclose, concealment of a fact"). The circumstances under which the law recognizes such a duty have traditionally been limited to: (1) the existence of a fiduciary relationship between the parties, *see Schulman v. Wolske & Blue Co., L.P.A.*, 125 Ohio App.3d 365, 372, 708 N.E 2d 753, 758 (Ohio App. 10 Dist. 1998); and (2) relationships in which "one party imposes confidence in the other because of that person's position, and the other party knows of this confidence." *Central States Stamping Co. v. Terminal Equipment Co., Inc.*, 727 F.2d 1405, 1409 (6th Cir. 1984) (citing *Smith v. Patterson*, 33 Ohio St. 70, 75-76 (Ohio 1877)).

The Defendants proffer no argument that such a relationship exists in the instant case. Indeed, the Court finds no reason why Plaintiffs would have any

---

[3] That the saga of this litigation would be of any interest to the television public speaks volumes regarding the intelligence of television audiences.

duty to inform the Defendants that Bosley may in the future discuss the instant lawsuit.

The Defendants' argument is ridiculous. First, Defendant WFMJ is a sophisticated corporation that has employed at least eight attorneys on this litigation, generating at least 394 filings to date. Second, the case originated with Bosley appearing at a Key West bar and taking her clothes off to dance naked before an assemble mob, hardly the shy-and-retiring-type who would forgo embarrassing herself if it meant more publicity. Third, Bosley and Defendants are complete antagonists. Finally, Plaintiffs' counsel Kabat was clear that Bosley rejected any confidentiality provision other than one involving the value of the settlement. Nothing suggests the existence of a fiduciary relationship between the parties or that the Defendants imposed any confidence in Bosley. The Defendants' argument that the settlement contract was voidable because Bosley did not disclose any plans she had to go publicize the settlement fails.

Finally, the Magistrate Judge correctly found in Defendants' favor in concluding that the parties agreed to mutual releases and Plaintiffs were obligated to release all claims and every party named in Plaintiffs' complaint, including affiliates of Defendant WFMJ Television Inc. Plaintiffs' complaint alleged causes of action against affiliates and employees of affiliates of

Defendant WFMJ[4]. Describing the settlement discussion relating to who would be released, Plaintiffs Attorney Kabat testified:

> A . . I asked him, since we were having a dispute as to the money, I said, who are you negotiating for? Is it just WFMJ, because I had not heard Mr. Lanzo say a word that day or Mr. Juhasz say a word that day, and I was hopeful that maybe I could get some money out of Miss Nicks and Mr. Urchek. And Mr. Bolton said to me, no, I'm negotiating *on behalf of all the defendants,*

---

[4] In part, Plaintiffs's complaint alleged:

> 14. The identities of XYZ Companies 1-50, PDQ Companies 1-50, John Does 1-50, and Jane Does 1-50 are not presently known. This Complaint will be amended to include the names of such individuals and entities when identified.
>
> 15. Upon information and belief, XYZ Companies 1-50 are affiliates, employees, agents, parents, or subsidiaries of Defendants 21 WFMJ, WFMJ Television, Inc., and/or Andrews Cycles, Inc., and/or entities otherwise associated with these Defendants who had the right and ability to supervise the activities alleged herein and received a direct financial benefit from this misconduct.
>
> 16. Upon information and belief, John Does 1-50 are owners, officers, employees, and/or agents of Defendants 21 WFMJ, WFMJ Television, Inc., Andrew Cycles, Inc., and/or and/or who had the right and ability to supervise the activities alleged herein and received a direct financial benefit from this s misconduct.
>
> [Doc. 1 at *3-4]

> *and this will resolve the case for all of the defendants* (Emphasis added.).

(Hr'g Mot. Enforce Settlement, Tr. at 9, Jan. 30, 2006.) Kabat further explained "[t]hat there would be no claims pending against our clients, the plaintiffs, and there would be no claims pending *against the defendants that were named in the lawsuit*." (Hr'g Mot. Enforce Settlement, Tr. at 10, Jan. 30, 2006.) (Emphasis added.) As described above, Plaintiffs' complaint made claims against "affiliates, employees, agents, parents, or subsidiaries of Defendants 21 WFMJ, WFMJ Television, Inc., and/or entities otherwise associated with these Defendants who had the right and ability to supervise the activities alleged . . ." Defense Attorney Bolton gave similar testimony. He testified that "[t]he plaintiffs would release claims against the defendants; defendants would release the claims against the plaintiffs." (Hr'g Mot. Enforce Settlement, Tr. at 96, Jan. 30, 2006.)

A general release, not restricted by its terms to particular claims or demands, ordinarily releases all claims and demands which could have been brought and were known to the parties at the time of the release. Unless expressly excepted, known claims die with the general release. *Overberg v. Lusby*, 727 F. Supp. 1091, 1093 (E.D. Ky. 1990) ("If the parties intended to leave some things out of a general release, then 'their intent to do so should be made manifest.'") (quoting *United States v. William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118, 128 (1907)), aff'd 921 F.2d 90 (6th Cir. 1990).

The Magistrate Judge found the settlement released all claims. The Magistrate had more than sufficient support for this finding and the Court adopts the Magistrate Judge's finding and reasoning.

C. The Defendants' Motion to Supplement

Defendants separately move this Court to supplement the record of their January 30, 2006 hearing before Magistrate Judge Limbert to include their affidavits averring that Magistrate Limbert told them during settlement discussions that he had been directed to enforce the settlement agreement. The motion is odd for several reasons. First, Defendants allege that Magistrate Judge Limbert made this statement on January 30, 2006, during settlement discussions *before the hearing*. Despite having an ability to make a record of the statement in the hearing that followed the settlement discussions, Defendants said nothing, suggesting that Defendants' counsel attached no significance to the purported statement. Any competent counsel understand it is important for the record to reflect all meaningful case-related matter.

Moreover, the hearing on the motion to enforce the settlement closed on January 30, 2006. Judge Limbert then afforded the parties two weeks to file briefing. Defendants then filed a brief, an amended brief, a forty-one page supplemental brief and a substitute brief. Despite hundreds of pages of briefing (most would say overkill that reflects their weak argument) the Defendants made no argument that Judge Limbert would not fairly decide the issues. That defense counsel would spend tens of thousands of their client's

money on the briefing papers betrays their later claim that they interpreted Judge Limbert's statement to reflect that no fair consideration of their arguments would be given.

Only when Judge Limbert decided the case against them on February 24, 2006, did Defendant file this belated motion to supplement the record result. The motion is pointless. First, the Court referred the matter to Magistrate Judge Limbert for a report and recommendation. With his February 24, 2006, Report and Recommendation, the referral ends. Despite numerous opportunities to include the affidavits in the record before the Magistrate made his Report, Defendant failed to do so. They have now filed the affidavits with this Court and the affidavits are part of this Court's record. No purpose would be served by including the affidavits as if they had been before Judge Limbert.

Second and as described below, without justification, the Defendants have failed to timely object to the Magistrate's Report and Recommendation. Having failed to comply with this time requirement, the Defendant cannot appeal. Civil Rule 72 says, in part:

> Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made.

In *Thomas v. Arn*, the Sixth Circuit found that a plaintiff's failure to file timely objection to the report and recommendation of a magistrate waived further appeal to the circuit court. 728 F.2d 813 (6th Cir. 1984) (citing *Walters*, 638 F.2d at 947). The Supreme Court affirmed. *Thomas*, 474 U.S. at 140; *United States v. Hunter*, 4 Fed. Appx. 295, 2001 WL 128297 at *4 (6th Cir. 2001) ("In order to preserve an issue for appeal, a defendant is required to file objections with the district court to the findings of the magistrate judge.")

Because the Defendants' failure to timely object waived their right to appellate review of this holding, the Defendants' motions to supplement the record is now moot. Accordingly, the motion is denied.

IV. Conclusion

For the reasons described below, the Court finds that the parties agreed, in their oral agreement of settlement, to the terms as outlined in the Magistrate's Report & Recommendation. Therefore, the Court **GRANTS** the Plaintiffs' motion to enforce the settlement agreement reached on November 23, 2005; **DENIES** the Plaintiffs' motion to vacate the Court's November 26, 2005 Order of Settlement; **DENIES** the Plaintiffs' motion to withdraw their motion to enforce the settlement agreement; **DENIES** the Defendants' motions to supplement the record; **GRANTS** the Plaintiffs' motion to strike the Defendants' objections; **DENIES** the Defendants' motion for leave to file objections to the Magistrate Judge's Report And Recommendation; and **ADOPTS** Magistrate Judge Limbert's Report & Recommendation in full.

IT IS SO ORDERED.

Dated: April 7, 2006

s/James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 4:04-CV-02529

[Filed November 25, 2005]

CATHERINE BOSLEY,	)
RICHARD BROWN,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
WFMJ, Television, Inc., *et al.*,	)
	)
Defendants.	)
	)

Notice of Settlement

Defendants WFMJ Television, Inc., Michelle Nicks, and John Urchak hereby notify the Court that they have effectively reached a settlement with the plaintiffs. The documents consummating the settlement are being drafted now. They have not yet been circulated, or (obviously) signed. Accordingly, there is no need to impanel a jury for trial on Monday, November 28, 2005.

/s/ David L. Marburger
David L. Marburger (0025747)
BAKER & HOSTETLER LLP
3200 National City Center
1900 East 9th Street
Cleveland, Ohio 44114
Telephone: (216) 621-0200
Facsimile: (216) 696-0740
E-mail: dmarburger@bakerlaw.com
E-mail:arupert@bakerlaw.com

Stephen T. Bolton, Esq. (0010994)
Manchester, Bennett, Powers & Ullman
Atrium Level Two
The Commerce Building
201 East Commerce Street
Youngstown, Ohio 44503
Telephone: (330) 743-1171
Facsimile: (330) 743-1190
Attorneys for Defendant
WFMJ Television, Inc.

/John Juhasz/
John Juhasz (0023777)
7330 Market Street
Youngstown, Ohio 44512-5610
Telephone: 330.758.2308
Facsimile: 330.758.8290
E-mail: Jbjjurisdoc@yahoo.com
Attorney for Defendant Michelle Nicks

/James E. Lanzo/
James E. Lanzo (0069530)
4126 Youngstown-Poland Rd.
Youngstown, Ohio 44514
E-mail: attylanzo@aol.com
Attorney for Defendant John Urchak

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically on November 25, 2005, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel for plaintiffs.

/s/ David L. Marburger
David L. Marburger

500960127.1, Notice of Tentative Settlement

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CASE NO. 4:04CV02529

[Filed November 26, 2005]

CATHERINE BOSLEY, ET AL.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
21 WFMJ, ET AL.,	)
	)
Defendants.	)
	)

ORDER

Upon representation of counsel that the above-captioned case has been settled between the parties, IT IS ORDERED that the docket be marked, "settled and dismissed with prejudice."

Any subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order.

FURTHER, the Court retains continuing jurisdiction to resolve disputes concerning the memorialization of this settlement agreement. *See Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375 (1994).

Dated: November 26, 2005

s/ *James S. Gwin*
JUDGE JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

APPENDIX E

Case: 4:04-cv-02529-JG As of: 11/20/2007
04:40 PM EST 1 of 1

Appeal, Cat11, LCI, Limbert, MotRef, Standard, Stay, Termed

U. S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
(Youngstown)

CIVIL DOCKET FOR CASE #: 4:04–CV–2529–JG

[Excerpt, Page 1, dated November 20, 2007]

Bosley et al v. 21 WFMJ et al
Assigned to: Judge James S. Gwin
Case in other court: 6th Circuit, 06-03091
6th Circuit, 06-03624
6th Circuit, 06-03625
6th Circuit, 06-03626
6th Circuit, 06-03894
6th Circuit, 06-03895
Cause: 17:101 Copyright Infringement

Date Filed: 12/23/2004
Date Terminated: 11/26/2005
Jury Demand: Both
Nature of Suit: 820 Copyright
Jurisdiction: Federal Question

Date Filed	#	Docket Text
01/19/2006	346	FILED IN ERROR - ATTORNEY TO REFILE AS A MOTION - Notice of *Withdrawal of Motion to Enforce Settlement Agreement Reached on November 23, 2005* filed by all plaintiffs. Related document(s) 333 . (Polk, Shannon) Modified text on 1/20/2006 (S, T). (Entered: 01/19/2006)
01/19/2006	347	Motion to vacate *11/26/05 Order Marking this Case as Settled and Dismissed and for a New Date for the Trial of Plaintiffs' claims* filed by all plaintiffs. Related document(s) 331. (Polk, Shannon) Modified on 1/23/2006 to unterminate motion (S, A). (Entered: 01/19/2006)
01/20/2006	348	Motion to Withdrawal Document Motion to Enforce Settlement Agreement Reached On November 23, 2005 filed by all plaintiffs. Related document(s) (346, 333.) (Polk, Shannon) Modified text on 1/23/2006 (S, T). Modified on 1/23/2006 to unterminate motion (S, A). (Entered: 01/20/2006)

Date Filed	#	Docket Text
01/23/2006	349	Order: An evidentiary hearing and oral argument are scheduled upon plaintiffs' motion to enforce settlement before Magistrate Judge Limbert in Youngstown, Ohio, on 1/30/06 at 1:00 p.m. (Related documents 337 and 333). Signed by Magistrate Judge George J. Limbert on 1/23/06. (S, A) (Entered: 01/23/2006)
01/23/2006		Order (non-document) denying as moot defendant WFMJ Television, Inc.'s motion to reschedule the conference hearing for evidentiary hearing (Related Doc # 343). Entered on behalf of Magistrate Judge George J. Limbert on 1/23/06. (S, A) (Entered: 01/23/2006)

Date Filed	#	Docket Text
01/23/2006		DOCUMENT FILED IN ERROR; MOTION IS STILL PENDING; Order (non-document) denying as moot plaintiffs' motion to vacate the 11/26/05 order marking this case as settled (Related Doc # 347). Entered on behalf of Magistrate Judge George J. Limbert on 1/23/06.(S, A) Modified on 1/23/2006 (S, A). (Entered: 01/23/2006)
01/23/2006		DOCUMENT FILED IN ERROR; MOTION IS STILL PENDING; Order (non-document) denying as moot plaintiffs' motion to enforce plaintiffs' notice of withdrawal of motion to enforce settlement agreement reached on 11/23/05 (Related Doc # 348). Entered on behalf of Magistrate Judge George J. Limbert on 1/23/06. (S. A) Modified on 1/23/2006 (S, A). (Entered: 01/23/2006)

APPENDIX F

Case 4:04-cv-02529-JG Document 346 Filed 01/19/2006 Page 1 of 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 4:04-CV-02529

[Filed January 19, 2006]

CATHERINE BOSLEY, *aka* CATHERINE BALSLEY, et al.,	)
Plaintiffs,	)
-vs-	)
21 WFMJ, et al.	)
Defendants.	)

PLAINTIFFS' NOTICE OF WITHDRAWAL OF MOTION TO ENFORCE SETTLEMENT AGREEMENT REACHED ON NOVEMBER 23, 2005

Plaintiffs, by and through counsel, hereby withdraw their Motion to Enforce Settlement

Agreement Reached on November 23, 2005, which was filed on December 15, 2005.

Respectfully submitted,

s/ Shannon J. Polk
SHANNON J. POLK (0072891)
HABER ▪ POLK, LLP
Eaton Center, Suite 620
1111 Superior Avenue
Cleveland, Ohio 44114
Phone: (216) 241-0700
Fax: (216) 241-0739
Email: spolk@haberpolk.com

s/ Andrew A. Kabat
ANDREW A. KABAT (0063720)
REMINGER & REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue,
West Cleveland, Ohio 44115
Phone: (216) 687-1311
Fax: (216) 687-1841
Email: akabat@reminger.com

Case 4:04-cv-02529-JG Document 346
Filed 01/19/2006 Page 2 of 2

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Shannon J. Polk
ANDREW A. KABAT (0063720)
SHANNON J. POLK (0072891)

APPENDIX G

Case 4:04-cv-02529-JG Document 348 Filed 01/20/2006 Page 1 of 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 4:04-CV-02529

[Filed January 20, 2006]

CATHERINE BOSLEY, *aka* CATHERINE BALSLEY, et al.,	)
Plaintiffs,	)
-vs-	)
21 WFMJ, et al.	)
Defendants.	)

PLAINTIFFS' NOTICE OF WITHDRAWAL OF MOTION TO ENFORCE SETTLEMENT AGREEMENT REACHED ON NOVEMBER 23, 2005

Plaintiffs, by and through counsel, hereby withdraw their Motion to Enforce Settlement

Agreement Reached on November 23, 2005, which was filed on December 15, 2005.

Respectfully submitted,

s/ Shannon J. Polk
SHANNON J. POLK (0072891)
HABER ▪ POLK, LLP
Eaton Center, Suite 620
1111 Superior Avenue
Cleveland, Ohio 44114
Phone: (216) 241-0700
Fax: (216) 241-0739
Email: spolk@haberpolk.com

s/ Andrew A. Kabat
ANDREW A. KABAT (0063720)
REMINGER & REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue,
West Cleveland, Ohio 44115
Phone: (216) 687-1311
Fax: (216) 687-1841
Email: akabat@reminger.com

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/s/ Shannon J. Polk
ANDREW A. KABAT (0063720)
SHANNON J. POLK (0072891)

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 4:04-CV-02529

[Filed January 19, 2006]

CATHERINE BOSLEY, *aka* CATHERINE BALSLEY, et al.,	)
Plaintiffs,	)
-vs-	)
21 WFMJ, et al.	)
Defendants.	)

PLAINTIFFS' MOTION TO VACATE 11/26/05 ORDER MARKING THIS CASE AS SETTLED AND DISMISSED AND FOR A NEW DATE FOR THE TRIAL OF PLAINTIFFS' CLAIMS

Plaintiffs, by and through counsel, hereby ask this Court to: (1) vacate its 11/26/05 Order, which marked the case settled and dismissed based upon Defense counsel's written representation that a settlement had been reached; and (2) place this case back on the

Court's active docket and issue a new date for the trial of Plaintiffs' claims at the Court's earliest availability. Plaintiffs' lead counsel will be engaged in a trial starting February 15, 2006, which will last about seven (7) days before the Cuyahoga County Court of Common Pleas, Honorable Michael Russo, captioned *Americab v. Cohen & Co.* Plaintiffs' counsel is available/can make himself available for trial any time after that trial.

The grounds for this motion are simple and straightforward. Following specific negotiations, Plaintiffs considered this case resolved - and so did the Defendants. However, after agreeing to specific terms, Defendants refused to honor their commitments. This was detailed in prior pleadings.

Unable to resolve matters without Court intervention, on December 25, 2005, Plaintiffs filed a motion to enforce their November 23, 2005 settlement agreement. This Court referred that Motion to Magistrate Limbert on January 6, 2006. On January 12, 2006, Magistrate Limbert scheduled a hearing for January 18, 2006. However, that hearing did not go forward due to the unavailability of the Defendants and/or their counsel.[1] In fact, as recent as yesterday afternoon, while trying to arrange for an alternative

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[1] Originally, lead counsel for Plaintiffs had a conflict with the January 18, 2006 date, so the parties jointly sought a new date for the hearing. However, soon thereafter, lead counsel for Plaintiffs resolved his conflict, made himself available for the January 18, 2006 hearing well in advance of that date, and also communicated these same facts to Defendants' counsel.

hearing date in the near future, Defendants' counsel, David Marburger, represented that Defendants are unable to go forward with any hearing on this issue until sometime in February. Mr. Marburger has taken this position because *he* in particular is apparently not available, despite the fact that he is unnecessary for any evidentiary hearing regarding Plaintiffs' motion to enforce because he played absolutely no role in the settlement discussions which were the subject of that motion. Candidly, the Defendants are represented by a host of attorneys in this case, and any of those lawyers should be capable of appearing on behalf of the Defendants, with or without Mr. Marburger.

It has been almost two months since the Defendants agreed to a resolution of this case. Nevertheless, Plaintiffs are no closer to actually resolving this case than they were back then. Consequently, Plaintiffs ask this Court to vacate its 11/26/05 Order, which marked the case settled and dismissed; and (2) place this case back on the Court's active docket and issue a new date for the trial of Plaintiffs' claims at the Court's earliest availability.

Respectfully submitted,

s/ Shannon J. Polk
SHANNON J. POLK (0072891)
HABER ▪ POLK, LLP
Eaton Center, Suite 620
1111 Superior Avenue
Cleveland, Ohio 44114
Phone: (216) 241-0700
Fax: (216) 241-0739
Email: spolk@haberpolk.com

s/ Andrew A. Kabat
ANDREW A. KABAT (0063720)
REMINGER & REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue,
West Cleveland, Ohio 44115
Phone: (216) 687-1311
Fax: (216) 687-1841
Email: akabat@reminger.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Shannon J. Polk
ANDREW A. KABAT (0063720)
SHANNON J. POLK (0072891)

APPENDIX I

Baker & Hostetler LLP
3200 National City Center
1900 East 9th Street
Cleveland, OH 44114-3485

T 216.621.0200
F 216.696.0740
www.bakerlaw.com

August 2, 2007

VIA HAND DELIVERY

David L. Marburger
direct dial: 216.861.7956
dmarburger@bakerlaw.com

Andrew Kabat, Esq
Reminger & Reminger Co., L.P. A.
1400 Midland Building
101 West Prospect Avenue
Cleveland, Ohio 44114

Richard Haber, Esq. and Shannon Polk, Esq.
Haber Polk LLP
1111 Superior Avenue - Suite 620
Eaton Center
Cleveland, Ohio 44114

Re: Bosley v. WFMJ et al.

Gentlemen:

Unconditional offer to pay

The court of appeals' of opinion is to affirm the district court's order granting Ms. Bosley's motion to enforce settlement and we anticipate the court of appeals to issue a mandate consistent with that opinion. In obedience to the court of appeals' opinion and anticipated mandate, we offer to pay the entire settlement amount plus post-judgment interest (which this letter describes in more detail later).

Also:

(a) You have twice moved the district court for an order awarding the payment of attorneys' fees incurred in the plaintiffs' litigating in that court from December, 2005, through May, 2006, which didn't succeed because of procedural miscues. We opposed those motions. In resolving them, the district court did not reject the substantive grounds that you presented.

(b) You have threatened to move for the same sanctions again, and presumably will comply with appropriate procedures.

As a result of all of that, we will pay the following funds within one to three business days after you notify us as to how and to whom we should pay the funds:

1. Settlement amount. The entire settlement amount, which is [redacted].

2. **Post-judgment interest.** Post-judgment interest added to the [redacted] and to the pre-judgment interest described in paragraph 3, calculated from the date of the district court's opinion of April 7, 2006, granting Ms. Bosley's motion to enforce settlement, through the end of this week, at 4.77% as per 28 U.S.C. § 1961. That interest payment is [redacted].

3. **Prejudgment interest.** Pre-judgment interest on the [redacted] measured from seven days after Mr. Bolton's November 23, 2005, cell phone conversations with Mr. Kabat — December 1, 2005 — through April 6, 2006 (the day before the district court granted the motion to enforce settlement).

(a) That pre-judgment interest is calculated at 6% under Ohio Revised Code § 1343.03, 5703.47, and the Ohio Tax Commissioner's determination governing the year 2006.

(b) That pre-judgment interest payment is [redacted]

4. **Attorneys' fees.** $20,000, assuming that covers all reasonable attorneys' fees for services rendered by Reminger & Reminger, and Haber Polk for litigating in the district court for the period beginning December, 2005, through May, 2006.

To eliminate misunderstanding, this paragraph 4 covers the services of preparing the following items listed on the district court's docket in this case:

motion to enforce settlement	12/15/05	# 333
brief opposing motion to reschedule hearing	1/17/06	# 345
notice withdrawing settlement motion	1/19/06	# 346
motion to vacate	1/19/06	# 347
motion to withdrawal document motion to	1/20/06	# 348
enforce settlement		
preparing for, and attending evidentiary hearing before Magistrate Judge Limbert, including negotiations while at Judge Limbert's chambers	1/30/06	see minutes dated 1/31/06
brief in support of motion to enforce settlement	2/03/06	# 355
motion for sanctions	3/14/06	# 374
motion to strike	3/14/06	# 375
motion to strike objections	3/16/06	# 380
opposition to motion for leave to file objections	3/17/06	# 382
opposition to 1st motion to recuse	3/29/06	# 388

opposition to motion to stay	4/03/06	# 392
notice of withdrawal of motion for sanctions	4/03/06	# 393
response to objections	4/03/06	# 394
motion for sanctions	4/26/06	# 406
opposition to 2d motion to recuse	4/27/06	# 408
reply to responses to motion for sanctions	5/18/06	# 417
response to motion to stay	5/23/06	# 419

5. **Reasonable attorneys' fees beyond $20,000.** If $20,000 does not cover all reasonable attorneys' fees for services rendered by Reminger & Reminger, and Haber Polk, in litigating in the district court from December, 2005, through May, 2006, please advise us as to how much more than $20,000 would cover all reasonable fees for those services and provide the documentation described below.

The documentation would show all of the services for which each law firm seeks payment for litigating in the district court from December 1, 2005, through May 2006, including those services covered by the $20,000 that this letter offers. The documentation would:

(a) describe each service provided; and

(b) identify each attorney who performed each service; and

(c) list the amount of time spent by each attorney in performing each service; and

(d) list the hourly rate of each attorney who performed each service, as attributed in your firms' record-keeping in December, 2005, and January through May, 2006 for services provided in the Bosley case.

We don't need documentation unless the law firms seek more than $20,000 in reasonable attorneys' fees for litigating in the district court from December, 2005 through May, 2006. You can follow this paragraph 5 even if you accept the offered $20,000.

We would not pay an amount for reasonable attorneys' fees beyond $20,000 if we decided that the added amount is inconsistent with this letter, unreasonable, or if we are uncomfortable with the reliability of the documentation of fees and services that you provide to justify the added amount. When you provide reliable, itemized documentation, we will give you the benefit of the doubt on whether the requested fees are reasonable, which means that we'll resolve doubt in favor of offering to pay those added fees.

6. **Costs.** The full amount of costs to be paid by the defense as shown by the transcript of the testimony of Messrs. Kabat and Bolton in the evidentiary hearing before Magistrate Judge Limbert on January 30, 2006.

Process for making the payments

We will pay the funds described in paragraphs 1 through 4 to you as quickly as practicable after you

notify us how and to whom you want us to pay the money. Obviously, we would pay the money only in a fashion that would document that we actually paid it and to whom, *e.g.* by check. As said at the outset of this letter, we expect to be able to process that money in one to three business days after you tell us how and to whom to pay the money.

As for the funds described in paragraph 5, we will pay those promptly if there are any to be paid as that paragraph describes.

As for costs, we are in the process of calculating the amount of costs to pay to you. We will advise you of that amount, how we figured it, and promptly offer to pay that amount separately.

This offer is not contingent upon your clients or their counsel signing any legal instrument or agreeing to anything except what we would need to document and facilitate payment.

Very truly yours,

David L. Marburger

DLM/tk

APPENDIX J

Reminger & Reminger
ATTORNEYS AT LAW
Andrew A. Kabat
Direct Dial No.(216) 430-2172
Email:akabat@reminger.com

August 3, 2007

VIA EMAIL: dmarburger@bakerlaw.com
AND FACSIMILE: 216-696-0740
David L. Marburger, Esq.
BAKER & HOSTETLER LLP
3200 National City Center
1900 East 9th Street
Cleveland, Ohio 44114-3485

Re: *Catherine Bosley, et al. v. 21 WFMJ, et al.*
United States District Court; Case No.: 4:04CV2529
Our File No.: 9020-07-55578-04

Dear David:

On behalf of the Plaintiffs, we accept your August 2, 2007 "unconditional offer to pay" the funds described in paragraphs 1-4. Please provide the funds to me within the next 1-3 business days by way of certified bank check made payable to Catherine Bosley, Richard Brown and their attorneys Reminger & Reminger Co., L.P.A. Our Tax I.D. No. is 34-1101394.

We believe that we are entitled to attorney fees not only for work performed in connection with the District Court proceedings identified in your letter, but for the appeal as well. Our fees certainly exceed $20,000. I am happy to prepare a detailed billing statement for you to review as requested. However, please understand that, by accepting your unconditional offer to pay items Nos. 1-4, we are not waiving our right to collect fees in excess of $20,000. It is our sincere hope that we can resolve the remaining issue concerning attorney fees amicably and withdraw our pending Motion in the Court of Appeals and forego the filing of a similar motion with the District Court. I will forward the fee statement to you very shortly and then we can discuss this issue further.

Finally, I look forward to receive your calculation as to costs due. We can have a conversation upon receipt of this information. Thank you.

Very truly yours,

REMINGER & REMINGER CO., L.P.A.

Andrew A. Kabat

Andrew A. Kabat

AAK:mo